Supreme Court, U.S.
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No. 04 313

In The
Supreme Court of the United States

PORTLAND PUBLIC SCHOOLS,
SUSAN WINTHROP, and ROBERT CREBO,

Petitioners,

v.

PAMELLA E. SETTLEGOODE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err, in light of the Supreme Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), in reversing an order granting a new trial when the appellant failed to challenge that order in her opening brief on appeal?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the case caption.

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DECISIONS BELOW

The June 9, 2004, order and amended opinion of the United States Court of Appeals for the Ninth Circuit are reported at 371 F.3d 503 (9th Cir. 2004) and are reprinted in Appendix A. The April 5, 2004, opinion of the Ninth Circuit is reported at 362 F.3d 1118 (9th Cir. 2004) and is reprinted in Appendix B. The January 31, 2002, opinion, order, and judgment of the United States District Court for the District of Oregon are unreported and are reprinted in Appendix C.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its order and amended opinion on June 9, 2004. This petition for writ of certiorari is timely in that petitioners have filed it within 90 days of June 9, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rules 50 and 59 of the Federal Rules of Civil Procedure.

Rule 50 provides:

> **(a) Judgment as a Matter of Law.**
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of

law against that party with respect to a claim or defense that cannot under the controlling law be maintained without a favorable finding on that issue.

Rule 59 provides:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

. . .

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered.

STATEMENT OF THE CASE

Pamella Settlegoode was hired by Portland Public Schools as a special-education teacher for the 1998-1999 academic year on a probationary basis. Upon the completion of Settlegoode's probationary period, Portland Public Schools declined to renew her contract.

Settlegoode then filed this action against Portland Public Schools and two of its employees, Susan Winthrop and Robert Crebo (collectively, the "Portland Schools"), alleging that she was terminated for criticizing Portland Public Schools' special-education programs. Settlegoode alleged that her termination violated section 504 of the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978 (the "Rehabilitation Act"), 29 U.S.C. § 794; her First Amendment free-speech rights under 42 U.S.C. § 1983; and Oregon's Whistleblower Law, Or. Rev. Stat. §§ 659A.200-.224. The district court had jurisdiction over Settlegoode's claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. Following a trial, the jury found for Settlegoode on all claims and awarded her $500,000 in noneconomic damages and $402,000 in economic damages, as well as $50,000 in punitive damages against Winthrop and Crebo under section 1983.

Following the jury's verdict, the district court granted the Portland Schools' motion for judgment as a matter of law on all three claims. The district court also granted the Portland Schools' motion for new trial on the ground that Settlegoode's counsel had engaged in misconduct. Finally, the district court conditionally ordered a new trial on the additional ground that the jury's verdict was against the clear weight of the evidence.

On appeal, the Ninth Circuit reversed the district court's grant of judgment as a matter of law for the Portland Schools on Settlegoode's section 1983 claim, as well as the order granting a new trial based on attorney misconduct, and reinstated the jury's verdict on the section 1983 claim. The panel's opinion did not, however, mention the district court's conditional grant of a new trial on the ground that the verdict was against the clear weight of the evidence.

The Portland Schools petitioned for rehearing by the panel and for rehearing *en banc* on the ground that Settlegoode, in her opening brief, had not claimed error in the following rulings of the district court: (1) the district court's conditional grant of a new trial, (2) the district court's ruling that Settlegoode presented no evidence of the existence of an official policy or widespread custom of illegal discrimination on the part of Portland Public Schools for purposes of determining liability under section 1983, and (3) the district court's determination that the law was not sufficiently clear to preclude qualified immunity for Winthrop and Crebo with respect to Settlegoode's section 1983 claims.

In response, the panel requested additional briefing, but only on the question whether Settlegoode, as required by *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978), had proved ratification or a pattern and practice of illegal discrimination by Portland Public Schools and whether she properly raised the issue on appeal. Settlegoode then conceded that she had not raised the *Monell* issue, but urged the panel to nonetheless reinstate the jury's verdict on her claim under the Rehabilitation Act.

The panel's amended opinion, issued on June 9, 2004, held that Settlegoode had failed to raise the *Monell* issue and, accordingly, affirmed the district court's grant of judgment as a matter of law with respect to her section 1983 claim against Portland Public Schools. The amended opinion further held, however, that evidence supported Settlegoode's claim under the Rehabilitation Act and reinstated the jury's verdict on that claim. Once again, the panel overlooked Settlegoode's failure to challenge the district court's order granting a new trial. In a single footnoted sentence, the panel stated that it reversed the district court's grant of a new trial for the same reasons it reversed the district court's grant of judgment as a matter of law on Settlegoode's Rehabilitation Act claim. *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 512 n.6 (9th Cir. 2004).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's amended opinion is at odds with the long-standing principle that appellate review is confined to only those rulings challenged by the parties on appeal. Because Settlegoode did not challenge the district court's order awarding a new trial, the Portland Schools had no opportunity to be heard on that issue, and the issue was not properly before the Ninth Circuit. Consequently, the Ninth Circuit erred in reviewing and reversing the district court's order granting a new trial.

Certiorari is appropriate if "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this

Court's supervisory power." Sup. Ct. R. 10(a). The Ninth Circuit's reversal of a district court ruling not challenged in Settlegoode's opening brief presents just such a case.

The Court should grant certiorari because the Ninth Circuit's decision conflicts with the Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as well as the law of every circuit. In *El Paso*, the Court held that the Ninth Circuit erred in addressing a district court ruling that the appellee had not challenged by way of cross-appeal. The rationale underlying *El Paso* is fully applicable to cases such as this one, in which the appellant has failed to challenge a ruling of the district court on appeal.

Moreover, the law of every circuit is uniform: appellate courts review only those issues raised on appeal. Nevertheless, the Ninth Circuit reinstated the jury's verdict in its entirety, even though Settlegoode failed to challenge the district court's grant of a new trial. When the Portland Schools pointed this out, the Ninth Circuit disregarded Settlegoode's failure to challenge the new trial ruling, and it reversed the ruling in a single footnoted sentence. *Settlegoode*, 371 F.3d at 512 n.6. In so doing, the Ninth Circuit prevented the Portland Schools from addressing the propriety of the district court's order granting a new trial, thereby flouting the uniform rule that issues not raised on appeal are not properly before the court. The Court should therefore use its supervisory power to steer this case back on to the accepted and usual course by vacating the amended opinion and remanding the case to the Ninth Circuit with instructions to remand to the district court for a new trial.

I. The Ninth Circuit's Amended Opinion Contradicts Both Supreme Court Precedent and the Rule of Every Circuit by Reviewing a Ruling of the District Court Not Challenged on Appeal.

In *El Paso*, the Court granted review, vacated, and remanded when the Ninth Circuit had considered and decided issues not raised on appeal. 526 U.S. at 479-82. *El Paso* addressed the question whether the Ninth Circuit had erred in reviewing a ruling not challenged by the appellee by way of cross-appeal. *Id.* The Supreme Court reaffirmed the well-established rule that orders not challenged by cross-appeal are not properly before the court.

> Because respondents did not appeal those portions of the District Court's orders enjoining them from pursuing Price-Anderson Act claims in Tribal Court, those injunctions were not properly before the Court of Appeals, which consequently erred in addressing them. We have repeatedly affirmed two linked principles governing the consequences of an appellee's failure to cross-appeal. Absent a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court," but may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary."

El Paso, 526 U.S. at 479 (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)). *El Paso* also rejected the Ninth Circuit's holding that "important comity considerations" justified *sua sponte* consideration of the unappealed portions of the district court's order. 526 U.S. at 479.

> The Court of Appeals apparently took the view, shared by a number of courts over the years, that the prohibition on modifying judgments in favor of a nonappealing party is a "rule of practice," subject to exceptions, not an unqualified limit on the power of appellate courts. Petitioners and the Government say the Court of Appeals was mistaken, seeing the rule as an unqualified bound on the jurisdiction of the courts of appeals. We need not decide the theoretical status of such a firmly entrenched rule, however, for even if it is not strictly jurisdictional (a point we do not resolve) *the "comity considerations" invoked by the Court of Appeals to justify relaxing it are clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances.* Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule.

526 U.S. at 480 (footnote omitted) (emphasis added). The Court explained the rationale for the cross-appeal requirement as follows:

> It is not there to penalize parties who fail to assert their rights, but is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not.

El Paso, 526 U.S. at 481-82. Because the Ninth Circuit reviewed a ruling not challenged by the appellee, this Court reversed and remanded the case to the Ninth Circuit with instructions to remand to the district court for further proceedings. 526 U.S. at 479-82, 488.

The rationale underlying *El Paso* applies equally when an *appellant* does not challenge a ruling of the district court. Just as the appellant in *El Paso* had no opportunity to address the portion of the district court's ruling not challenged by the appellee, an appellee has no chance to address the propriety of a district court's ruling not challenged by an appellant. To protect "the institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not," *El Paso*, 526 U.S. at 481-82, an appellate court should not be permitted to review district court rulings not challenged by appellants as well as appellees. Consistent with *El Paso*, the law of all the circuits – including the Ninth Circuit – precludes a court from addressing issues not raised in an opening brief.[1]

Indeed, in this very case, the Ninth Circuit's amended opinion recognizes the uniform rule in two instances. *See Settlegoode*, 371 F.3d at 516 n.11 ("Settlegoode failed to challenge the magistrate's holding that the School Board could not be held liable under section 1983 . . . . Thus, we

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[1] Every circuit is in accord. *See Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 352 (1st Cir. 1989); *Wit v. Berman*, 306 F.3d 1256, 1259 (2d Cir. 2002); *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 136 n.2 (3d Cir. 2002); *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996); *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004); *Smith v. Ameritech*, 129 F.3d 857, 864-65 n.3 (6th Cir. 1997); *Grayson v. City of Chicago*, 317 F.3d 745, 751 (7th Cir. 2003); *Williams v. Chai-Hsu Lu*, 335 F.3d 807, 809 (8th Cir. 2003); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001); *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1232-33 n.7 (10th Cir. 2000); *Chapman v. AI Transp.*, 229 F.3d 1012, 1044 (11th Cir. 2000); *Steffan v. Perry*, 41 F.3d 677, 695 (D.C. Cir. 1994); *Apotex, Inc. v. Thompson*, 347 F.3d 1335, 1355 (Fed. Cir. 2003).

affirm the district court's grant of judgment as a matter of law with respect to the section 1983 claims against the School Board.") (citation omitted); *Settlegoode*, 371 F.3d at 516 n.10 ("However, because Settlegoode has not raised this on appeal, the issue is waived."). Nonetheless, the Ninth Circuit failed to follow the rule when it mattered most: to Settlegoode's failure to challenge the district court's conditional grant of a new trial.

Because Settlegoode failed to challenge the district court's order awarding a new trial in her opening brief, the propriety of that order was not properly before the Ninth Circuit. The Ninth Circuit's departure from this settled rule justifies review by the Supreme Court.

II. The Ninth Circuit's Willingness to Reverse a District Court Ruling Not Challenged on Appeal Has Caused the Portland Schools to Suffer Substantial Prejudice.

The Ninth Circuit's decision to reverse a ruling not challenged on appeal has substantially prejudiced the Portland Schools. The court not only deprived the Portland Schools of the opportunity to address the propriety of the district court's order granting a new trial, but also applied the wrong standard in reviewing that order. In reversing the order granting a new trial for the same reasons as it reversed the district court's grant of judgment as a matter of law, *Settlegoode*, 371 F.3d at 512 n.6, the Ninth Circuit failed to account for the fact that motions for a new trial and for judgment as a matter of law are analyzed under entirely different standards.

In deciding a motion for judgment as a matter of law, "the district court 'must not substitute its own credibility

assessments and its weighing of the evidence for the jury's; it must limit itself to determining whether the jury's verdict is supported by substantial evidence.'" *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 189 (9th Cir. 1989) (quoting *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1416 (9th Cir. 1989), *amended by* No. 86-2798, 1989 U.S. App. LEXIS 5945 (9th Cir. Apr. 28, 1989)). By contrast, the standard for granting a motion for a new trial is far more liberal: the district court "'can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party.'" *Air-Sea Forwarders*, 880 F.2d at 190 (quoting *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987)).

In addition, the district court could properly assess and weigh the credibility of the testimony of interested witnesses (such as Winthrop and Crebo) for purposes of deciding a motion for new trial, but could not consider the same testimony in deciding a motion for judgment as a matter of law. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). Had Settlegoode challenged the order granting a new trial on all claims, defendants would have had the opportunity to argue why the testimony of Winthrop and Crebo – which was excluded for purposes of evaluating the grant of judgment as a matter of law – would have supported the district court's order awarding a new trial. In addition, defendants would have been able to argue that the district court, after weighing all the evidence and making credibility determinations, did not abuse its discretion in awarding a new trial.

Further, the district court's grant of judgment as a matter of law is reviewed *de novo* on appeal, *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000),

while an order granting a new trial is reviewed for abuse of discretion, *Amantea-Cabrera v. Potter*, 279 F.3d 746, 750 (9th Cir. 2002). Because the standard for judgment as a matter of law is considerably stricter than the standard for a new trial, the Portland Schools have unjustly been deprived of the opportunity to argue that the district court's grant of a new trial was proper.

The court's amended opinion is also inconsistent with prior decisions of the Seventh and Ninth Circuits. The Ninth Circuit has held that because the standards for review of judgment as a matter of law and new trial differ, an appellant who challenges a district court's grant of judgment as a matter of law but not the alternative grant of a new trial waives the right to challenge the order granting a new trial. In *Cleveland v. Southern Pacific Co.*, 436 F.2d 77, 78 (9th Cir. 1970), the district court granted judgment notwithstanding the verdict for the defendant and, in the alternative, granted a new trial if the judgment were reversed on appeal. On appeal, the Ninth Circuit reversed the judgment, but declined to reverse the district court's grant of a new trial on the ground that the plaintiff had failed to challenge the order granting a new trial. *Cleveland*, 436 F.2d at 80-81 ("Plaintiff appealed from the judgment n. o. v., but did not, in the notice of appeal or in her briefs on appeal, oppose the alternative order granting a new trial. . . . Under the described circumstances we consider that plaintiff has not effectively challenged the order granting a new trial."). Similarly, in *Cruz v. Town of Cicero, Illinois*, 275 F.3d 579 (7th Cir. 2001), the Seventh Circuit refused to review the district court's order denying a motion for a new trial because the appellant had failed to raise the new trial issue on appeal.

> Although Cicero filed motions for judgment as a matter of law and for a new trial with the district court, it has framed its challenge on appeal to the equal protection verdict only in terms of whether, based on the evidence presented at trial, a reasonable jury could conclude that Cicero committed an equal protection violation. This formulation of the standard of review applies only to the denial of a motion for judgment as a matter of law. Cicero has thus waived any argument that it was entitled to a new trial because the jury's verdict was against the manifest weight of the evidence, a claim we would review for abuse of discretion.

Cruz, 275 F.3d at 586 (citation omitted).

Thus, the law is settled that a challenge to an order granting judgment as a matter of law does not include a challenge to an order granting a new trial. By reversing the district court's order granting a new trial, the Ninth Circuit deprived the Portland Schools of the opportunity to fully participate in the appellate process by briefing and arguing the question whether the district court properly awarded a new trial. The Ninth Circuit then compounded its error by applying an incorrect standard in reversing the district court's order granting a new trial. The Court should rectify the Ninth Circuit's error and order a remand to the district court for a new trial on all claims.

CONCLUSION

The Ninth Circuit's decision improperly addressed and decided an essential ruling of the district court that Settlegoode did not challenge on appeal. As reflected in this Court's opinion in *El Paso*, fundamental fairness dictates that appellate courts confine their review to only those rulings challenged on appeal. The Court should therefore grant this petition.

Respectfully submitted,

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APPENDIX A

371 F.3d 503 (9th Cir. 2004)

Pamella E. SETTLEGOODE, Plaintiff-Appellant,

v.

PORTLAND PUBLIC SCHOOLS, Multnomah School District No. 1; Susan Winthrop; Robert Crebo; Larry Whitson, Defendants-Appellees.

No. 02-35260.

United States Court of Appeals, Ninth CIrcuit.

Argued Oct. 7, 2003.

Submitted April 5, 2004.

Filed April 5, 2004.

Amended June 9, 2004.

Charles J. Merten, Portland, OR, argued for the plaintiff-appellant.

Bruce L. Campbell, Portland, OR, argued for the defendants-appellees.

Appeal from the United States District Court for the District of Oregon, Janice M. Stewart, Magistrate Judge, Presiding. D.C. No. CV-00-00313-ST.

Before D.W. NELSON, KOZINSKI and McKEOWN, Circuit Judges.

ORDER AND AMENDED OPINION

KOZINSKI, Circuit Judge:

ORDER

The opinion in this case is amended as follows:

Slip op. 4201, Line 11:

Insert "most of" before "the issues"

Slip op. 4201, Lines 15-16:

Delete "In other words, the section 1983 claim is both necessary and sufficient to sustain the jury's full verdict."

Slip op. 4205, Line 19:

Insert the following as a new footnote 6 at the end of the paragraph:

"The magistrate also granted judgment as a matter of law on Settlegoode's Rehabilitation Act claim based on Settlegoode's inability to write adequate IEPs. *Settlegoode,* CV-00-313-ST, at 25-26. There is some dispute as to which of the parties had the burden of proof under the Rehabilitation Act. Because we find the evidence about Settlegoode's IEPs entirely unconvincing in light of the demanding Rule 50 standard, and Settlegoode offered evidence that her IEPs had hardly been altered by her supervisors and that IEPs are easily criticized, the jury's verdict under the Rehabilitation Act is amply supported by the record, regardless of where the burden of proof falls.

We also reverse the magistrate's grant of a new trial based on insufficiency of the evidence for the reasons stated above."

The remaining footnotes are re-numbered accordingly.

Slip op. 4206, n. 7 (formerly n. 6), Line 6:

Insert ", in part," before "was concerned"

Slip op. 4206, n. 7 (formerly n. 6), Lines 12-16:

Replace "Once the case has proceeded to trial, these concerns fall by the wayside and the *Saucier* sequence is inapplicable. The court, rather, may decide the issues in whatever order it believes would serve the interests of justice in light of the then-existing circumstances."

with

"Once the case has proceeded to trial, these concerns fall by the wayside and the sequence in which the court decides the two issues is no longer important. Although the court must still decide both issues, it may do so in whatever order it believes would serve the interests of justice in light of the then-existing circumstances."

Slip op. 4212, Line 12:

Replace "Because we hold" with "We hold"

Slip op. 4212, Line 14:

Insert "against Winthrop and Crebo" after "1983 claims"

Slip op. 4212, Lines 14-15:

Delete ", we need not address her other claims"

Slip op. 4212, Line 17:

Insert the following as a new footnote 11 after "under section 1983.":

"Settlegoode failed to challenge the magistrate's holding that the School Board could not be held

liable under section 1983 because Settlegoode did not prove ratification or a pattern and practice, as required by *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See Settlegoode,* CV-00-313-ST, at 35. Thus, we affirm the district court's grant of judgment as a matter of law with respect to the section 1983 claims against the School Board. However, because we also find the School Board liable under the Rehabilitation Act, *see* note 6 *supra,* it is still liable for compensatory damages. *See Duvall v. County of Kitsap,* 260 F.3d 1124, 1141 (9th Cir.2001) (*Monell* only applies to section 1983 claims, and not to Rehabilitation Act claims, which are governed by respondeat superior); *Bonner v. Lewis,* 857 F.2d 559, 566-67 (9th Cir.1988) (municipalities are not exempted from respondeat superior liability under the Rehabilitation Act)."

The remaining footnotes are re-numbered accordingly.

The petition for rehearing is otherwise denied and the petition for rehearing en banc is rejected. Fed. R.App. P. 35; Fed. R.App. P. 40. No further petitions for rehearing or rehearing en banc will be accepted. The mandate shall issue forthwith.

OPINION

We consider the standard of review applicable to various post-trial motions following a jury verdict.

Facts

Many facts were hotly disputed at trial. We state them here consistent with the verdict.

Dr. Pamella Settlegoode was hired by Portland Public Schools as an Adapted Physical Education teacher for the 1998-99 academic year on a probationary basis. Hired to teach students with disabilities in various schools in the district, she was an itinerant teacher and therefore conducted her physical education classes at two or three different schools each day. Her job included teaching the disabled students as well as drafting individualized education programs (IEP) for them, as mandated by federal law. *See* 20 U.S.C. § 1414(d).

Settlegoode soon became concerned about the way disabled students were treated in the Portland schools. She had trouble finding a place to teach her high school students; material and equipment were often lacking, inadequate or unsafe. Settlegoode tried to talk to her immediate supervisor, Susan Winthrop, about these problems. Winthrop told Settlegoode that she was the only one who had ever complained about the facilities for disabled students, and Winthrop frequently attempted to change the subject. At the end of her first year of teaching, Settlegoode wrote Winthrop's supervisor, Robert Crebo, a ten-page letter expressing her concern that the Adapted Physical Education program suffered from problems of "[s]ystematic discrimination, maladministration, access, pedagogy, curriculum, equity and parity," and "greatly compromised" federal law. E.R. at 132. She described her negative experiences in several different schools in the district, comparing the treatment of disabled students to that of black students before the Civil Rights Movement.

"In sum," she wrote, "these sketches offer a portraiture of a form of education that is . . . all too familiar in this country. It wasn't all that long ago when Black African Americans took a back seat on the American School bus (though in Portland, there's still lots of 'Separate, but equal' to go around)." *Id.* at 141. Settlegoode also criticized Winthrop in this letter, claiming that Winthrop was dismissive of Settlegoode's concern for her students, and that Winthrop was too tied to the school bureaucracy to be in touch with the needs of disabled students.

Crebo gave Settlegoode's letter to Winthrop for comment. Winthrop replied with a memo to Crebo stating: "It is of concern to me that a staff member with such limited experience has the potential to defame my character and damage my professional reputation." *Id.* at 144. Winthrop ended with, "I appreciate your support in this." *Id.* Crebo then asked Winthrop to draft a response to Settlegoode's letter and to investigate Settlegoode's accusations. In the meantime, Winthrop told Settlegoode to stop writing letters, because it was not "an effective means of communicating." S.E.R. at 61.

Crebo's response to Settlegoode's letter defended Winthrop and the school district's treatment of disabled students. The letter ended by stating: "It is puzzling to me that with this limited experience you've made such critical comments about our system. It is unfortunate that you are so dissatisfied with your teaching position in Portland Public Schools." *Id.* at 155.

During Settlegoode's first year of teaching, her performance evaluations were generally positive. In all categories, Winthrop wrote that Settlegoode's performance met minimum standards. She elaborated that Settlegoode's

instruction was "well planned, appropriate, and of high interest." *Id.* at 222. She also wrote that Settlegoode "is supportive of students, giving them good feedback and treating them with respect," and that she "has creative ideas and effectively uses unique materials to enhance activities." *Id.* With regard to the preparation of IEPs for her students, Winthrop explained that, "Ms. Settlegoode is working to develop her skills in writing IEP goals and objectives which are measurable. She has not yet had opportunities to prepare evaluation reports." *Id.*

Winthrop's evaluations after Settlegoode's letter were much more negative. Settlegoode no longer met minimum standards of performance in several areas, including IEP writing, behavior management practices, ability to maintain maximal instruction time for students, ability to interact positively with administrators, supervisors and colleagues, and ability to interact positively with parents and students. Winthrop noted in the evaluations that Settlegoode "is not writing IEP goals which are measurable nor is she establishing baseline data in the Present Level of Education Performance (PLOP). IEP objectives do not consistently include specific student behavior and measurable criteria." *Id.* at 232.[1] Winthrop also wrote that Settlegoode was "strong, outspoken, and demanding," and that she was "not able to listen to constructive criticism, complete a self reflective process, and improve professional behavior." *Id.* at 235. The evaluation ended by stating that, "[i]f Dr. Settlegoode's work continues at its present

[1] An IEP begins by measuring the student's present level of performance – affectionately known as PLOP – which provides a benchmark for measuring the student's progress toward the goals stated in the IEP.

quality, renewal of contract for another year cannot be recommended." *Id.* at 237.

Settlegoode next wrote a fifteen-page letter to Dr. Ben Canada, the superintendent of Portland Public Schools, claiming that she was being retaliated against for complaining about the treatment of her students. She also reiterated her contention that the facilities for disabled students in the school district were inadequate. She claimed these conditions were "discriminatory." *Id.* at 172. Canada testified that "at that point . . . [c]ounsel [was] involved." *Id.* at 335.

Crebo then responded to Settlegoode's letter to Canada. He wrote:

> I want you to understand, clearly, that I am not going to respond to your issues, accusations and subjective characterizations of situations and other professionals.
>
> As your Supervisor, Susan Winthrop, has indicated to you these long, written communications are not an effective way to deal with issues. In fact, you have been directed to discontinue this practice and meet with your supervisor to discuss any issues about which you are concerned.
>
> There is one assertion that you make in your most recent 15 page letter to Dr. Canada that is very troubling to me to which I will respond. You assert that your "reporting of events has reaped professional retaliation" and you assert further that this retaliation continues. This allegation is absolutely without merit. Ms. Winthrop will continue to perform her duties as your Supervisor which is to provide you with honest and direct feedback on your job performance.

Id. at 177.

Crebo also wrote a memo to Canada, saying that it was "likely that . . . [Settlegoode] will not be recommended for renewal." *Id.* at 178. The memo explained that Settlegoode had been "writing lengthy letters to her supervisor and the Director of Special Education that were hostile, accusatory, and demanding," and that she had been "highly critical of special education services, administrators, and other staff." *Id.* The memo also discussed Settlegoode's difficulty in communicating with her colleagues and managing groups of students, and her lack of responsiveness to constructive feedback. *Id.*

Settlegoode's final evaluation noted improvement in some areas, but stated that she was still deficient in writing IEPs, that her communication with others "continues to be difficult," and that she had problems monitoring groups of students. *Id.* at 240-44. It also stated that her performance fell below district standards and that her contract would not be recommended for renewal. *Id.* at 245. The School Board then met about whether to renew Settlegoode's contract and decided not to. S.E.R. at 198.

Settlegoode brought suit against the Portland Public Schools, Winthrop and Crebo, alleging that defendants violated section 504 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794, Settlegoode's First Amendment free speech rights under 42 U.S.C. § 1983, and Oregon's Whistleblower Act, ORS 659A.200.224.[2] A jury found for Settlegoode on

[2] Settlegoode voluntarily dismissed her claim under the Equal Pay Act, 29 U.S.C. § 206(d), her defamation claim and all claims against

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all claims and awarded her $500,000 in non-economic damages and $402,000 in economic damages. In addition, the jury awarded $50,000 in punitive damages against both Winthrop and Crebo under section 1983.

The magistrate judge granted defendants' motion for judgment as a matter of law on all three causes of action, and held that Winthrop and Crebo were entitled to qualified immunity on the section 1983 claim. The magistrate also granted defendants' motion for a new trial because she found Settlegoode's counsel had engaged in misconduct. Not surprisingly, Settlegoode appeals.

Analysis

A district court may set aside a jury verdict and grant judgment as a matter of law "only if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir.2001); Fed.R.Civ.P. 50(b). When evaluating such a motion, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

Merits

We consider plaintiff's section 1983 claim first because, if she succeeds, most of the issues pertaining to the remaining claims become redundant and therefore moot.

Larry Whitson, another administrative supervisor for Portland Public Schools.

The section 1983 claim, moreover, is the only one supporting punitive damages and we must therefore address it at some point, regardless of the other claims.

1. When a government employee alleges that he has been punished in retaliation for exercising his First Amendment rights, we engage in a three-part inquiry: To prevail, an employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the punishment. Even if the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. *Keyser v. Sacramento Unified Sch. Dist.,* 265 F.3d 741, 750 (9th Cir.2001). The magistrate judge found that Settlegoode "presented substantial evidence that the content of her speech reporting violations of the law by the District was a factor . . . for the nonrenewal decision," *Settlegoode v. Portland Public Schools,* CV 00-313-ST, slip op. at 30 (D.Or. Jan. 31, 2002), but held that defendants prevailed on the third element of the *Keyser* test. According to the magistrate judge:

> [T]he absence of defendants' liability is clear. . . . [E]ven if plaintiff had not complained of matters related to the treatment of special education students, the District proved, without any contrary evidence by plaintiff, that *her inability to write IEPs was sufficient for it to deny renewal of her probationary contract.* Thus, the District would have taken the same action even in the absence of protected speech.

Id. at 38 (emphasis added).

The inadequacy of Settlegoode's IEPs, however, is not nearly as clear as the magistrate judge seemed to believe.

The only documentary evidence that Settlegoode's IEPs were inadequate consists of Winthrop's evaluations, which were written after Settlegoode had sent her first letter criticizing her and the school district. Winthrop also criticized Settlegoode's IEPs in her testimony but, as the magistrate judge recognized, the jury could have disregarded her testimony because of her interest in the case. *Reeves,* 530 U.S. at 151, 120 S.Ct. 2097. The only other evidence concerning Settlegoode's ability to write IEPs came from Carol Matarazzo, the former Assistant Superintendent of Portland Public Schools. Matarazzo, however, testified that she never even saw Settlegoode's IEP drafts, nor made any independent evaluation of Settlegoode's performance. She also admitted that she was "not directly involved in the evaluation of probationary teachers," Tr. of Trial at 1390 (No. CV 3-00-313 ST) (Nov. 14, 2001), and that all of her "impressions" of Settlegoode were based on reading Winthrop's evaluations. *Id.* at 1391. When asked about her participation in the decision not to renew Settlegoode's contract, she explained: "I read through all of . . . [Winthrop and Crebo's] evaluations and talked to Ms. Winthrop, her supervisor, and to Bob Crebo" before deciding that Settlegoode would not be able to be "a satisfactory teacher." *Id.* at 1395. This would hardly allow Matarazzo to form an independent opinion of Settlegoode's ability to draft acceptable IEPs. Thus, evidence of Settlegoode's deficiencies in writing IEPs hinged entirely on Winthrop's word, which the jury was certainly entitled to disregard.

At the same time, there is no evidence that defendants discarded or even substantially revised Settlegoode's IEP drafts. Writing IEPs is a dynamic, collaborative process, one that involves a group of parents, teachers and administrators working together to prepare an education program

suitable for a disabled child. *See* 20 U.S.C. § 1414(d)(1)(B). No single teacher writes an IEP alone. A teacher may draft a section of the IEP, but ultimately that section is evaluated by the IEP team and incorporated into an overall program for the student. IEPs are mandated by federal law and create legally enforceable rights and obligations that bind the district and the pupil for at least an entire school year. *See id.* § 1414(d)(2). A school district thus has both the legal obligation and the incentive not to import a poorly drafted section into an IEP. One would expect that a truly inadequate IEP would be substantially criticized, revised or discarded.[3] As one administrator testified, in the Portland schools, inappropriate or substandard IEPs were noted at IEP meetings and corrected. E.R. at 431-32.

Yet the only evidence that anyone ever altered one of Settlegoode's IEPs came from Larry Whitson, who testified that he changed a single page of one of Settlegoode's IEPs recommending Tai Chi for a student. Whitson's changes, however, did not reflect Settlegoode's inability to write IEPs with measurable goals – the main criticism listed in her evaluations – but concerned a substantive disagreement about whether Tai Chi was an appropriate skill for a disabled child to learn.[4] Whitson never said Settlegoode's

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[3] As former Assistant Superintendent Matarazzo explained, "[t]he [IEP] is the linchpin of Special Education. . . . [I]f you don't meet the expectations in the IEP you have to provide compensatory services and make sure you get it accomplished. So having a well-written, accurate, appropriate Individualized Education Plan is essential." Tr. of Trial at 1391-92 (No. CV 3-00-313-ST) (Nov. 14, 2001).

[4] Whitson explained: "[T]he IEP team decided that we would write a page for Adapted P.E. that said that [the disabled student] would learn skills in three new . . . recreation areas. It did not rule out teaching Tai Chi. It just allowed us . . . to have a discussion about

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IEP was objectively inadequate or failed to include measurable goals. No other evidence was presented at trial that Settlegoode's IEPs were found to be defective during the IEP process.

Settlegoode presented this argument to the magistrate judge, who rejected it, explaining:

> [P]laintiff reasons that if her IEPs were crucial for her, then they were equally crucial for the students. Thus, if they were as inadequate as Winthrop claims, then defendants would have produced evidence that they disregarded them or corrected them by calling another IEP meeting. *This argument improperly attempts to shift the burden of persuasion from plaintiff to defendants.*

Settlegoode, CV 00-313-ST, at 15 (emphasis added). However, it is clear that the burden in section 1983 claims is, indeed, on defendants to show that they "would have taken the same action even in the absence of the protected conduct." *Keyser,* 265 F.3d at 750.

Even if defendants had shown that Settlegoode's IEPs were inadequate, that still would not have been enough under *Keyser.* Defendants were required to show that they "*would* have taken the same action even in the absence of the protected conduct." *Id.* (emphasis added). Proof that Settlegoode's IEPs were deficient only tells us that the school district *could* have chosen not to renew Settlegoode's contract for reasons independent of the protected conduct. The magistrate judge said almost nothing about this distinction, but it is a crucial one. Defendants, for

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whether or not that would be appropriate." Tr. of Trial at 1037-38 (No. CV 3-00-313-ST) (Nov. 13, 2001).

example, offered no evidence that other teachers had been fired for drafting inadequate IEPs in the past or that it was unusual for new teachers to struggle with IEP writing. To the contrary, two teachers in Settlegoode's department testified that drafting IEPs is difficult, that it is easy to criticize any IEP and that IEPs would be a good place "to create a paper trail." Tr. of Trial at 133 (CV 3-00-313-ST) (Nov. 6, 2001). As the burden is on the defendants to show Settlegoode's contract would not have been renewed, even if she had kept silent, we cannot agree with the magistrate judge that they made a sufficient showing under *Keyser*.

The jury specifically found, as indicated on the verdict form, that defendants did not "prove[] by a preponderance of the evidence that they would not have renewed Dr. Settlegoode's contract for reasons other than Dr. Settlegoode's protected speech." E.R. at 637. In bringing their Rule 50 motion for judgment notwithstanding the verdict, defendants must vault a very high hurdle: They must show that no reasonable juror could have found that the school district *would* have renewed her contract but for her speech. At best, they have shown that whether Settlegoode's inadequate IEPs were the reason for her termination, or whether they were inadequate in the first place, is

a close call.[5] In such circumstances, the rule is clear: The verdict trumps.[6]

2. The magistrate judge also held that defendants Winthrop and Crebo are entitled to qualified immunity under section 1983. Public officials are immune from liability for section 1983 damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Where plaintiff is a government employee claiming violations of his First Amendment rights, he must show that two things were clearly established: (1) that his speech involved a matter of public concern, and (2) that the interests served by allowing him to express himself outweighed the state's interest in promoting workplace efficiency and avoiding workplace disruption. *Keyser,* 265 F.3d at 747; *see also Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d

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[5] We have considered the magistrate judge's in-depth analysis, including side-by-side comparisons of Settlegoode's and model IEPs. That the magistrate judge had to work so hard in reaching her conclusion alone suggests that this is not the kind of clear-cut case that warrants overturning the jury's verdict.

[6] The magistrate also granted judgment as a matter of law on Settlegoode's Rehabilitation Act claim based on Settlegoode's inability to write adequate IEPs. *Settlegoode,* CV-00-313-ST, at 25-26. There is some dispute as to which of the parties had the burden of proof under the Rehabilitation Act. Because we find the evidence about Settlegoode's IEPs entirely unconvincing in light of the demanding Rule 50 standard, and Settlegoode offered evidence that her IEPs had hardly been altered by her supervisors and that IEPs are easily criticized, the jury's verdict under the Rehabilitation Act is amply supported by the record, regardless of where the burden of proof falls. We also reverse the magistrate's grant of a new trial based on insufficiency of the evidence for the reasons stated above.

811 (1968) (announcing the balancing requirement for First Amendment claims in the context of government employment).[7] When balancing interests under the second prong of the test, defendants must show "'actual injury to . . . legitimate interests' beyond the 'disruption that necessarily accompanies' such speech." *Keyser,* 265 F.3d at 749 (quoting *Johnson v. Multnomah County,* 48 F.3d 420, 427 (9th Cir.1995)). The magistrate judge found that "plaintiff's speech [was] within the ambit of the First Amendment," and thus was a matter of public concern, *Settlegoode,* CV-00-313-ST, at 30, but held that the balancing of interests under the second prong of the qualified immunity test did not weigh clearly in Settlegoode's favor. The magistrate erred once again.

The magistrate judge started off on the wrong foot by failing to acknowledge the jury's determination of this issue, and thus did not consider the qualified immunity

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[7] In *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Supreme Court held that this inquiry must be made in two successive steps: The court must first determine whether "the facts alleged show the officer's conduct violated a constitutional right"; "the next, sequential step is to ask whether the right was clearly established" – an inquiry that "must be undertaken in light of the specific context of the case." *Id.* at 201, 121 S.Ct. 2151. *Saucier*, in part, was concerned with "'avoid[ing] excessive disruption of government and permit[ting] the resolution of many insubstantial claims on summary judgment,'" *id.* at 202, 121 S.Ct. 2151 (quoting *Harlow,* 457 U.S. at 818, 102 S.Ct. 2727), and thus established an analytic framework that would enhance the likelihood that claims will be resolved at "'the earliest possible stage in litigation,'" *id.* at 201, 102 S.Ct. 2727 (quoting *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)). Once the case has proceeded to trial, these concerns fall by the wayside and the sequence in which the court decides the two issues is no longer important. Although the court must still decide both issues, it may do so in whatever order it believes would serve the interests of justice in light of the then-existing circumstances.

question in light of the demanding Rule 50 standard. The jury here was properly instructed that, "[b]ecause some anger or unhappiness necessarily accompanies speech on issues of public concern, Defendants must prove that the School District suffered an actual injury to its legitimate interests beyond mere disruption of the workplace." E.R. at 540. The jury was also given the appropriate list of factors to consider in making this determination, including "whether Dr. Settlegoode's protected speech impeded the School District's abilities to perform its duties efficiently; . . . the manner, time and place of her protected speech; and . . . the context in which she made the protected speech." Tr. of Trial at 1539-40 (No. CV 3-00-313-ST) (Nov. 15, 2001).

In light of these instructions, the jury's verdict in favor of Settlegoode necessarily reflected a finding that any disruption her comments might have aroused was outweighed by Settlegoode's interest in free expression. Thus, under Rule 50, the magistrate judge should only have found that defendants were protected by qualified immunity if it was "'quite clear that the jury . . . reached a seriously erroneous result.'" *Ace v. Aetna Life Ins. Co.,* 139 F.3d 1241, 1248 (9th Cir.1998) (quoting *EEOC v. Pape Lift, Inc.,* 115 F.3d 676, 680 (9th Cir.1997)).

We cannot see how the jury's finding could possibly be deemed "seriously erroneous." There was a strong interest in allowing Settlegoode to express herself. Not only were Settlegoode's core First Amendment rights implicated, but her speech may have had important effects for the disabled students in the district and their parents. Teachers are uniquely situated to know whether students are receiving the type of attention and education that they deserve and, in this case, are federally entitled to. We have

long recognized "the importance of allowing teachers to speak out on school matters," *Connick v. Myers,* 461 U.S. 138, 162, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), because "'[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions'" on such matters, *id.* (quoting *Pickering,* 391 U.S. at 572, 88 S.Ct. 1731). This is particularly so with respect to disabled children, who may not be able to communicate effectively that they lack appropriate facilities. Teachers may therefore be the only guardians of these children's rights and interests during the school day. Whether or not Settlegoode's assertions were accurate, or were communicated in the best manner possible, it is clear that the subject matter of her expression was of public importance.

At the same time, the school district presented very little evidence of disruption. Settlegoode's method for conveying her dissatisfaction with the adapted physical education program included sending internal letters and discussing the issue with supervisors. She made her concerns known through proper channels, and made no public statements about the school conditions. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 868 (9th Cir.1999) (a factor to consider when balancing interests under *Pickering* is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague"). We are hard pressed to figure out what Settlegoode could have done that would have been more pleasing to the school district – except, of course, keep quiet.

Moreover, none of the testimony on which the magistrate judge relied shows "actual injury" to the district or to the adapted physical education program in any of the schools. Several teachers said they were hurt or upset by

Settlegoode's letter, as one would expect in these circumstances, but there was no evidence that the letter had a "devastating effect . . . on the cohesion of the APE teachers," as the magistrate judge found. *Settlegoode,* CV-00-313-ST, at 33. Gail Reynolds, a teacher in Settlegoode's department, testified that she was "furious," "[o]utraged," and "[u]pset" by the letter, but never described any actual injury to the department. S.E.R. at 94. In fact, she described just the opposite: after the letter, the department called a meeting "to talk about positive outcomes, and how we were going to work together as a team and go forward from here." *Id.* at 95.[8]

A second teacher, Jan Standlea, testified that she was "surprised" by Settlegoode's letter, E.R. at 464, but the rest of her testimony merely confirmed what Reynolds had said – that the letter prompted the teachers to discuss how better to cooperate with each other and how to improve physical education for disabled students. She explained in great detail the meeting that was held in response to the letter:

> Q. Were there ground rules for this meeting?
>
> A. Yes, there were . . . we established some ground rules with the group on some things, such as not talking over other people, and letting other people say what they needed to say.

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[8] It is highly doubtful, in any event, that an adverse reaction of those who are the subject of criticism could sustain a finding of actual injury. It is the nature of criticism that few welcome it and even fewer recognize it as justified. Nevertheless, receiving criticism – even unjust criticism – with grace is part of the job of being a public servant, and if unhappiness with criticism causes job disruption, this may be the fault of those being criticized rather than those doing the criticizing.

> And we went through a process where people – each person had one minute to discuss their negative reactions to the paper. And then they had one minute to discuss the positive reaction to the paper.
>
> And then we did some brainstorming of some ways in which we could come together as a team.
>
> Q. Would you look at Exhibit 101?
>
> A. Yes.
>
> Q. Was this something that resulted from the meeting that you've been telling the jury about?
>
> A. Yes, these are the notes that Michelle Chevallier typed up after our meeting was over with the results of our meeting.
>
> Q. Why aren't there negative comments on this document?
>
> A. Because part of this – the main reason for this meeting was to have – develop some group cohesion, so we didn't want to dwell on the negatives. So when the negatives were talked about in the meeting they were not written down.
>
> So the negative was not to be focused on, to get it out and have that go.
>
> And then when we talked about the positive aspects those were written down because we wanted this to be a positive outcome.

E.R. at 465-66.

The meeting notes further demonstrate that Settlegoode's letter brought the teachers together to help make positive changes to their department and the physical

education program, and that many of the teachers agreed with Settlegoode. The notes describe the "[m]any legitimate issues" mentioned in the letter, such as "[a]ccessibility" and "[e]quipment needs," and say that Settlegoode "has a lot of 'guts'" and that the letter "will help us pull together, now we are on 'the same page.'" *Id.* at 248. A reasonable jury could have found that Settlegoode's letter was harmonizing, rather than disruptive.[9]

The administrators who testified also failed to show that Settlegoode's letter was unusually disruptive or caused actual injury. Most of the administrators' testimony commented on Settlegoode's communication style, and reflected frustration with being criticized in such a pointed manner. For example, the principal of the high school said she wanted Settlegoode "out of my building, out of Franklin High School," *id.* at 472, because Settlegoode "did not understand how a high school worked," *id.* at 469. The same principal elaborated that Settlegoode made "charges against . . . my staff" and "made demands that they could not fulfill." *Id.* at 471. She described her relationship with Settlegoode as "strained." *Id.* at 473. Nothing in her testimony, however, offered details of injury to the district, such as impaired discipline or control by superiors, conflicts between co-workers or interference with Settlegoode's performance of her duties – factors we generally consider when deciding whether actual injury occurred. *Gilbrook,* 177 F.3d at 867-68. The magistrate judge thus erred when she held that defendants had "prove[d] that

[9] The magistrate judge relied on a third teacher's testimony as well; however, that teacher was never asked about any impact the letter had on the teachers or the school overall. She was only asked about her own reaction to the letter, which was "oh, my gosh." E.R. at 332.

plaintiff's speech did significantly disrupt the provision of educational services by the District." *Settlegoode,* CV-00-313-ST, at 33-34.

The magistrate judge also erred in concluding that Settlegoode's First Amendment rights were not clearly established. *See id.* at 35. Whether Settlegoode's First Amendment rights were clearly established "'depends upon the sensitive ad hoc balancing that *Pickering* entails.'" *Brewster v. Bd. of Educ.,* 149 F.3d 971, 980 (9th Cir.1998). We must therefore consider whether, under the governing law, a reasonable jury could have found that "'the outcome of the *Pickering* balance so clearly favored . . . [plaintiff] that it would have been patently unreasonable for the school officials to conclude that the First Amendment did not protect [her] speech.'" *Id.*[10] As we explain above, the jury was more than reasonable in finding that the interests served by allowing Settlegoode to express herself outweighed any minor workplace disruption that resulted from her speech. Furthermore, it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters. *See Connick,* 461 U.S. at 162, 103 S.Ct. 1684; *Pickering,* 391 U.S. at 572, 88 S.Ct. 1731. It would therefore have been patently unreasonable for Winthrop and Crebo to conclude that Settlegoode's speech was not protected. Winthrop and Crebo were not entitled to qualified immunity from Settlegoode's section 1983 claim.

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[10] It is not clear that the jury was instructed on this issue, and it would have been defendants' responsibility to offer such instructions and object if the magistrate judge refused to give them. However, because Settlegoode has not raised this on appeal, the issue is waived. *See Dilley v. Gunn,* 64 F.3d 1365, 1367 (9th Cir.1995).

We hold that the magistrate judge's grant of judgment as a matter of law should be reversed with respect to Settlegoode's section 1983 claims against Winthrop and Crebo. Settlegoode is entitled to the full jury award, including the punitive damages assessed against Winthrop and Crebo under section 1983.[11] She is also entitled to attorney's fees under 42 U.S.C. § 1988, which allows a "prevailing party" "reasonable attorney's fees."

Sanctions

The magistrate judge also granted defendants a new trial because she held that Settlegoode's attorney, Gregory Kafoury, made improper arguments during trial that prejudiced defendants' case. A new trial should only be granted where the "'flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Kehr v. Smith Barney,* 736 F.2d 1283, 1286 (9th Cir.1984) (quoting *Standard Oil Co. of California v. Perkins,* 347 F.2d 379, 388 (9th Cir.1965)).

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[11] Settlegoode failed to challenge the magistrate's holding that the School Board could not be held liable under section 1983 because Settlegoode did not prove ratification or a pattern and practice, as required by *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See Settlegoode,* CV-00-313-ST, at 35. Thus, we affirm the district court's grant of judgment as a matter of law with respect to the section 1983 claims against the School Board. However, because we also find the School Board liable under the Rehabilitation Act, *see* note 6 *supra,* it is still liable for compensatory damages. *See Duvall v. County of Kitsap,* 260 F.3d 1124, 1141 (9th Cir.2001) (*Monell* only applies to section 1983 claims, and not to Rehabilitation Act claims, which are governed by respondeat superior); *Bonner v. Lewis,* 857 F.2d 559, 566-67 (9th Cir.1988) (municipalities are not exempted from respondeat superior liability under the Rehabilitation Act).

There is an even "high[er] threshold" for granting a new trial where, as here, defendants failed to object to the alleged misconduct during trial. *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.,* 785 F.2d 656, 658 (9th Cir.1986). A higher threshold is necessary for two reasons: "First, raising an objection after the closing argument and before the jury begins deliberations 'permit[s] the judge to examine the alleged prejudice and to admonish . . . counsel or issue a curative instruction, if warranted.'" *Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1193 (9th Cir.2002) (quoting *Kaiser,* 785 F.2d at 658). Second, "allowing a party to wait to raise the error until after the negative verdict encourages that party to sit silent in the face of claimed error." *Id.* We thus review for plain or fundamental error where no contemporaneous objection was made. Plain error review requires: (1) an error; (2) that the error be plain or obvious; (3) that the error have been prejudicial or affect substantial rights; and (4) that review be necessary to prevent a miscarriage of justice. *Id.*

According to the magistrate judge, Kafoury committed misconduct at several points during the trial by ignoring a pretrial order prohibiting evidence as to whether the district's programs for disabled children violated the law. The pretrial order precluded all testimony going to the merits of the district's programs; "the only permissible evidence was whether plaintiff had been retaliated against for making 'good faith' complaints." *Settlegoode,* CV-00-313-ST, at 45-46. The magistrate judge drew a line here that was not particularly clear. It would have been nearly impossible for Settlegoode to show that she acted in "good faith" because she was not raising baseless allegations,

without allowing at least some evidence concerning the school district's programs.[12] We therefore read the magistrate judge's order narrowly and evaluate the specific instances of misconduct cited by the magistrate judge with this conundrum in mind.

The first alleged misconduct came during the examination of Judy Backer, the mother of one of Settlegoode's students. When Settlegoode's counsel called Backer to the stand, defendants objected that Backer's testimony would violate the pretrial order. The court allowed the evidence, so long as it was specifically given "to contradict" Winthrop's testimony that "she . . . secured the ramp at Franklin High School," Tr. of Trial at 1434-35 (No. CV 3-00-313-ST) (Nov. 14, 2001), and not to discuss the quality of the special education program. The magistrate judge faulted Kafoury for "ignor[ing] both the court's specific ruling as to Backer and its general rulings excluding program testimony." *Settlegoode,* CV-00-313-ST, at 47. We read the record otherwise.

Kafoury's brief direct examination of Backer focused almost entirely on the ramp issue, confirming that it was

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[12] In fact, the magistrate judge let in considerable evidence going to the quality of the district's programs. For example, the magistrate allowed Settlegoode to testify about the inadequacy of the district's programs and its alleged discriminatory conduct. Settlegoode's letters, which gave detailed descriptions of what she perceived to be violations of federal law, were also admitted into evidence. During cross-examination of Settlegoode, the magistrate judge admitted "the difficulty I find is that there has been so much testimony by the Plaintiff as to the merits of her complaints that there's a lot of room for cross examination." E.R. at 359-60. In addition, Winthrop, Crebo and Matarazzo were all allowed to testify that Settlegoode's complaints were false and inaccurate because this was supposedly part of their motivation for not renewing her contract. *Id.* at 401.

Settlegoode, not Winthrop, who was crucial in obtaining the ramp. While some of Backer's testimony may have "induc[ed] sympathy for a student with a disability," *id.* at 47, none of counsel's questions specifically elicited this testimony. Moreover, though Backer's testimony may have prompted some sympathy for Settlegoode and her efforts, its substance simply did not violate the pretrial order precluding testimony about the program's merit. Backer described her disabled daughter's enjoyment of tennis, and gave Settlegoode credit for making it possible for the child to participate in the sport. We do not see how this testimony bears on whether the school district's programs complied with the law. And while it may have been slightly off-topic from the ramp issue, we are aware of no authority for the proposition that counsel may never call a witness who may elicit sympathy from the jury while also providing relevant testimony. In short, what counsel did with respect to Backer falls well within the realm of vigorous, ethical advocacy.

The magistrate judge also cites as misconduct several of Kafoury's statements in his closing argument, including some that referred to Backer's testimony. The magistrate first criticized Kafoury's comments that, "[Winthrop] took away the tennis program. Broke the heart of this brave little girl suffering from the most cruel of disabilities." Did it just – just out of spite toward my client." *Id.* at 48. Though this argument may evoke sympathy, it also clearly goes to the heart of Settlegoode's retaliation claim. Settlegoode claimed that, not only was she fired, but her superiors first killed some of her programs in retaliation for her letter. This is a plausible argument in light of the record: Winthrop ended the tennis program, claiming it was "glaringly unsafe," E.R. at 378, just after Settlegoode

began voicing her criticisms of Winthrop and the school district. This is surely an acceptable argument to make in a retaliation case. While counsel used graphic terms such as "brave little girl," "most cruel of disabilities" and "spite toward my client" to make his argument, we see nothing wrong with this. A trial lawyer's job, after all, is to present his client's case in the most sympathetic light consistent with the evidence. Using some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms. Counsel's argument here came nowhere near stepping over the line.

The magistrate judge also took umbrage at several other statements made during Kafoury's closing argument. These statements included Kafoury's use of the "back of the bus" metaphor taken from Settlegoode's letter, and remarks about how football players and dancers were given priority over special education programs because they are more valuable to the school community. We have held that where "offending remarks occurred principally during opening statement and closing argument, rather than throughout the course of the trial," we are less inclined to find the statements pervaded the trial and thus prejudiced the jury. *Kehr,* 736 F.2d at 1286. In any event, Kafoury's statements were not so inflammatory as to be especially troubling. In *Bird v. Glacier Electric Cooperative, Inc.,* 255 F.3d 1136 (9th Cir.2001), a closing argument rose to the level of misconduct where counsel, speaking to a jury comprised only of Indian tribal members, argued that an Indian-owned cooperative's loss of business was part of a legacy of injustice and colonialism and used colorful language to describe that legacy. Plaintiff's counsel argued: "How can they trust any of their work to the likes of unskilled Indian contractors like these? Certainly the white

man's magic is so much better. . . . I think you have seen a classic defense to castrating the . . . laws on the reservation." *Id.* at 1150. Kafoury, by contrast, was not seeking to inflame racial prejudices or even establish any special interest in the rights of the disabled. His comments referred specifically to the evidence admitted at trial, and he directed his comments to defendants and the situation at hand.

The magistrate judge also criticized Kafoury for mischaracterizing one of defense counsel's statements in his closing argument. Defense counsel had said:

> This case is not about the children, and even if you heard things in this case that bothered you, that you wish Portland Public Schools would do differently, there's nothing that you can do with your verdict today that will change those particular cases or things that you thought should have been different.

Settlegoode, CV-00-313-ST, at 51. Kafoury responded: "Defense counsel said this is not about the children. The first thing she said. The second thing she said was, there is nothing you can do. If you don't like what you've heard, we're going to keep doing what we're gonna keep doing, and you can't stop us." *Id.* The magistrate judge held that this was a misrepresentation, when it plainly was not, and that it was inappropriate to urge the jury to "send a message."[13] This case, however, involves a claim for punitive

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[13] The magistrate judge also disapproved of another portion of Kafoury's closing argument, which also urged the jury to "send a message" to the district. Kafoury argued:

> And the question is whether you want to use this opportunity not just to do justice in this case, which sorely needs

(Continued on following page)

damages. Reminding the jury that they have the capacity to deter defendants and others similarly situated is certainly legitimate where punitive damages are at stake. Indeed, the magistrate judge instructed the jury that "[p]unitive damages may be awarded . . . to punish the wrongdoer and to *discourage the Defendant and others* from engaging in wanton misconduct." Tr. of Trial at 1547 (No. CV 3-00-313-ST) (Nov. 15, 2001) (emphasis added). *See also Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir.1991) (holding that counsel's actions did not rise to the level of misconduct where his closing argument called for "punishment" and to "make sure . . . [defendants] never forget about [the accident]"). A closing argument that tracks the jury instructions cannot possibly be misconduct.

The magistrate judge also held that Kafoury committed misconduct when he claimed defense witness testimony had been scripted and rehearsed by defense counsel. The magistrate judge cited no authority for the proposition that counsel may not assert that an opposing party's witness has been coached, and we're aware of none. Where counsel believes that testimony came out sounding too stilted or polished, we see nothing objectionable in suggesting to the jury that the witness may have been parroting words scripted by someone else. Nor is there anything objectionable about Kafoury's argument that the school

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> some justice, but whether you want to use this opportunity to give some power, some breathing room to those who want to make things better, to those who want to be advocates for kids, or whether you want to strengthen the dead hand of this bureaucracy whose face you've seen.

Settlegoode, No. CV-00-313-ST, at 52-53. For the reasons explained in text, we believe this statement was proper.

district employees had been told to make paper trails to cover their tracks. After all, this kind of thing happens all the time, and there was evidence showing that school district lawyers were involved prior to Settlegoode's termination. That Kafoury had no direct evidence supporting these arguments is of little consequence; circumstantial evidence and inference are sufficient to support a legitimate argument. Kafoury is not a prosecutor, subject to "constraints and responsibilities that don't apply to other lawyers." *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir.1993). As an advocate in a civil lawsuit, he was perfectly entitled to argue that the jury should disbelieve the opposing party's witnesses for any number of reasons, including that they may have been guided by advice of their lawyers. The sanction for making such an argument is that it may boomerang if it does not resonate with the jury.[14]

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[14] The magistrate judge cited several other instances of alleged misconduct. For example, the magistrate pointed to the fact that Kafoury "twice told the jury that the length of testimony in plaintiff's deposition and arbitration was 1,400 pages" when really it was just under 300 pages. *Settlegoode,* CV-00-313-ST, at 62. The magistrate also claimed Kafoury improperly tried twice to ask Settlegoode's doctor whether he agreed with defendant's expert witness that scientific evidence is not sufficient to prove stress causes Graves' Disease, one of the ailments that Settlegoode complained of, even though the court had previously ruled the doctor could not testify as a medical expert. The magistrate judge sustained objections to these questions, and removed damages stemming from Graves' Disease from consideration of the jury, but nevertheless held that Kafoury's questions amounted to misconduct. Finally, the magistrate judge held that Kafoury improperly tried to impeach the high school principal by criticizing her performance as principal. Defendants objected and the objection was sustained. We cannot see how any of this conduct, individually or taken together, amounts to misconduct worthy of the magistrate's attention.

The magistrate judge found that, taken together, the various instances of misconduct were sufficiently prejudicial to defendants' case as to merit a new trial. Even if we were to find that any misconduct occurred – and we have identified none – Kafoury's conduct at trial could not have possibly affected defendants' substantial rights. Even in cases where the trial court has found counsel's behavior is "outrageous," we've found no prejudice. *See Kehr,* 736 F.2d at 1285. Given that most of counsel's statements were limited to his closing argument, which was well within the bounds of fair advocacy, and there was more than sufficient evidence for the jury to find in Settlegoode's favor, we hold that the magistrate judge abused her discretion in ordering a new trial.

Conclusion

We reverse the district court's judgment and remand with instructions that the court enter judgment for plaintiffs consistent with the verdict, plus post-judgment interest and attorney's fees pursuant to 42 U.S.C. § 1988. We refer the case to the Appellate Commissioner for a determination of Settlegoode's attorney's fees on appeal.

REVERSED.

APPENDIX B

362 F.3d 1118 (9th Cir. 2004)

Pamella E. SETTLEGOODE,

Plaintiff-Appellant,

v.

PORTLAND PUBLIC SCHOOLS, Multnomah School District No. 1; Susan Winthrop; Robert Crebo; Larry Whitson, Defendants-Appellees.

No. 02-35260.

United States Court of Appeals,

Ninth Circuit.

Argued Oct. 7, 2003.
Submitted and Filed April 5, 2004.

Charles J. Merten, Portland, Oregon, for the plaintiff-appellant.

Bruce L. Campbell, Portland, Oregon, for the defendants-appellees.

Appeal from the United States District Court for the District of Oregon; Janice M. Stewart, Magistrate Judge, Presiding.

Before: D.W. NELSON, KOZINSKI and M. McKEOWN, Circuit Judges.

KOZINSKI, Circuit Judge:

We consider the standard of review applicable to various post-trial motions following a jury verdict.

Facts

Many facts were hotly disputed at trial. We state them here consistent with the verdict.

Dr. Pamella Settlegoode was hired by Portland Public Schools as an Adapted Physical Education teacher for the 1998-99 academic year on a probationary basis. Hired to teach students with disabilities in various schools in the district, she was an itinerant teacher and therefore conducted her physical education classes at two or three different schools each day. Her job included teaching the disabled students as well as drafting individualized education programs (IEP) for them, as mandated by federal law. *See* 20 U.S.C. § 1414(d).

Settlegoode soon became concerned about the way disabled students were treated in the Portland schools. She had trouble finding a place to teach her high school students; material and equipment were often lacking, inadequate or unsafe. Settlegoode tried to talk to her immediate supervisor, Susan Winthrop, about these problems. Winthrop told Settlegoode that she was the only one who had ever complained about the facilities for disabled students, and Winthrop frequently attempted to change the subject. At the end of her first year of teaching, Settlegoode wrote Winthrop's supervisor, Robert Crebo, a ten-page letter expressing her concern that the Adapted Physical Education program suffered from problems of "[s]ystematic discrimination, maladministration, access, pedagogy, curriculum, equity and parity," and "greatly compromised" federal law. E.R. at 132. She described her negative experiences in several different schools in the district, comparing the treatment of disabled students to that of black students before the Civil Rights Movement.

"In sum," she wrote, "these sketches offer a portraiture of a form of education that is . . . all too familiar in this country. It wasn't all that long ago when Black African Americans took a back seat on the American School bus (though in Portland, there's still lots of 'Separate, but equal' to go around)." *Id.* at 141. Settlegoode also criticized Winthrop in this letter, claiming that Winthrop was dismissive of Settlegoode's concern for her students, and that Winthrop was too tied to the school bureaucracy to be in touch with the needs of disabled students.

Crebo gave Settlegoode's letter to Winthrop for comment. Winthrop replied with a memo to Crebo stating: "It is of concern to me that a staff member with such limited experience has the potential to defame my character and damage my professional reputation." *Id.* at 144. Winthrop ended with, "I appreciate your support in this." *Id.* Crebo then asked Winthrop to draft a response to Settlegoode's letter and to investigate Settlegoode's accusations. In the meantime, Winthrop told Settlegoode to stop writing letters, because it was not "an effective means of communicating." S.E.R. at 61.

Crebo's response to Settlegoode's letter defended Winthrop and the school district's treatment of disabled students. The letter ended by stating: "It is puzzling to me that with this limited experience you've made such critical comments about our system. It is unfortunate that you are so dissatisfied with your teaching position in Portland Public Schools." *Id.* at 155.

During Settlegoode's first year of teaching, her performance evaluations were generally positive. In all categories, Winthrop wrote that Settlegoode's performance met minimum standards. She elaborated that Settlegoode's

instruction was "well planned, appropriate, and of high interest." *Id.* at 222. She also wrote that Settlegoode "is supportive of students, giving them good feedback and treating them with respect," and that she "has creative ideas and effectively uses unique materials to enhance activities." *Id.* With regard to the preparation of IEPs for her students, Winthrop explained that, "Ms. Settlegoode is working to develop her skills in writing IEP goals and objectives which are measurable. She has not yet had opportunities to prepare evaluation reports." *Id.*

Winthrop's evaluations after Settlegoode's letter were much more negative. Settlegoode no longer met minimum standards of performance in several areas, including IEP writing, behavior management practices, ability to maintain maximal instruction time for students, ability to interact positively with administrators, supervisors and colleagues, and ability to interact positively with parents and students. Winthrop noted in the evaluations that Settlegoode "is not writing IEP goals which are measurable nor is she establishing baseline data in the Present Level of Education Performance (PLOP). IEP objectives do not consistently include specific student behavior and measurable criteria." *Id.* at 232.[1] Winthrop also wrote that Settlegoode was "strong, outspoken, and demanding," and that she was "not able to listen to constructive criticism, complete a self reflective process, and improve professional behavior." *Id.* at 235. The evaluation ended by stating that, "[i]f Dr. Settlegoode's work continues at its present

[1] An IEP begins by measuring the student's present level of performance – affectionately known as PLOP – which provides a benchmark for measuring the student's progress toward the goals stated in the IEP.

quality, renewal of contract for another year cannot be recommended." *Id.* at 237.

Settlegoode next wrote a fifteen-page letter to Dr. Ben Canada, the superintendent of Portland Public Schools, claiming that she was being retaliated against for complaining about the treatment of her students. She also reiterated her contention that the facilities for disabled students in the school district were inadequate. She claimed these conditions were "discriminatory." *Id.* at 172. Canada testified that "at that point . . . [c]ounsel [was] involved." *Id.* at 335.

Crebo then responded to Settlegoode's letter to Canada. He wrote:

> I want you to understand, clearly, that I am not going to respond to your issues, accusations and subjective characterizations of situations and other professionals.
>
> As your Supervisor, Susan Winthrop, has indicated to you these long, written communications are not an effective way to deal with issues. In fact, you have been directed to discontinue this practice and meet with your supervisor to discuss any issues about which you are concerned.
>
> There is one assertion that you make in your most recent 15 page letter to Dr. Canada that is very troubling to me to which I will respond. You assert that your "reporting of events has reaped professional retaliation" and you assert further that this retaliation continues. This allegation is absolutely without merit. Ms. Winthrop will continue to perform her duties as your Supervisor which is to provide you with honest and direct feedback on your job performance.

Id. at 177.

Crebo also wrote a memo to Canada, saying that it was "likely that . . . [Settlegoode] will not be recommended for renewal." *Id.* at 178. The memo explained that Settlegoode had been "writing lengthy letters to her supervisor and the Director of Special Education that were hostile, accusatory, and demanding," and that she had been "highly critical of special education services, administrators, and other staff." *Id.* The memo also discussed Settlegoode's difficulty in communicating with her colleagues and managing groups of students, and her lack of responsiveness to constructive feedback. *Id.* Settlegoode's final evaluation noted improvement in some areas, but stated that she was still deficient in writing IEPs, that her communication with others "continues to be difficult," and that she had problems monitoring groups of students. *Id.* at 240-44. It also stated that her performance fell below district standards and that her contract would not be recommended for renewal. *Id.* at 245. The School Board then met about whether to renew Settlegoode's contract and decided not to. S.E.R. at 198.

Settlegoode brought suit against the Portland Public Schools, Winthrop and Crebo, alleging that defendants violated section 504 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794, Settlegoode's First Amendment free speech rights under 42 U.S.C. § 1983, and Oregon's Whistleblower Act, ORS 659A.200-.224.[2] A jury found for Settlegoode on all claims and awarded her $500,000 in non-economic

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[2] Settlegoode voluntarily dismissed her claim under the Equal Pay Act, 19 U.S.C. § 206(d), her defamation claim and all claims against Larry Whitson, another administrative supervisor for Portland Public Schools.

damages and $402,000 in economic damages. In addition, the jury awarded $50,000 in punitive damages against both Winthrop and Crebo under section 1983.

The magistrate judge granted defendants' motion for judgment as a matter of law on all three causes of action, and held that Winthrop and Crebo were entitled to qualified immunity on the section 1983 claim. The magistrate also granted defendants' motion for a new trial because she found Settlegoode's counsel had engaged in misconduct. Not surprisingly, Settlegoode appeals.

Analysis

A district court may set aside a jury verdict and grant judgment as a matter of law "only if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir.2001); Fed.R.Civ.P. 50(b). When evaluating such a motion, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

Merits

We consider plaintiff's section 1983 claim first because, if she succeeds, the issues pertaining to the remaining claims become redundant and therefore moot. The section 1983 claim, moreover, is the only one supporting punitive damages and we must therefore address it at some point, regardless of the other claims. In other words, the section 1983 claim is both necessary and sufficient to sustain the jury's full verdict.

1. When a government employee alleges that he has been punished in retaliation for exercising his First Amendment rights, we engage in a three-part inquiry: To prevail, an employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the punishment. Even if the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. *Keyser v. Sacramento Unified Sch. Dist.*, 265 F.3d 741, 750 (9th Cir.2001). The magistrate judge found that Settlegoode "presented substantial evidence that the content of her speech reporting violations of the law by the District was a factor . . . for the nonrenewal decision," *Settlegoode v. Portland Public Schools,* CV-00-313-ST, slip op. at 30, 2002 WL 31495823 (D.Or. Jan. 31, 2002), but held that defendants prevailed on the third element of the *Keyser* test. According to the magistrate judge:

> [T]he absence of defendants' liability is clear . . . . [E]ven if plaintiff had not complained of matters related to the treatment of special education students, the District proved, without any contrary evidence by plaintiff, that *her inability to write IEPs was sufficient for it to deny renewal of her probationary contract.* Thus, the District would have taken the same action even in the absence of protected speech.

Id. at 38 (emphasis added).

The inadequacy of Settlegoode's IEPs, however, is not nearly as clear as the magistrate judge seemed to believe. The only documentary evidence that Settlegoode's IEPs were inadequate consists of Winthrop's evaluations, which were written after Settlegoode had sent her first letter

criticizing her and the school district. Winthrop also criticized Settlegoode's IEPs in her testimony but, as the magistrate judge recognized, the jury could have disregarded her testimony because of her interest in the case. *Reeves,* 530 U.S. at 151, 120 S.Ct. 2097. The only other evidence concerning Settlegoode's ability to write IEPs came from Carol Matarazzo, the former Assistant Superintendent of Portland Public Schools. Matarazzo, however, testified that she never even saw Settlegoode's IEP drafts, nor made any independent evaluation of Settlegoode's performance. She also admitted that she was "not directly involved in the evaluation of probationary teachers," Tr. of Trial at 1390(No. CV 3-00-313-ST) (Nov. 14, 2001), and that all of her "impressions" of Settlegoode were based on reading Winthrop's evaluations. *Id.* at 1391, 120 S.Ct. 2097. When asked about her participation in the decision not to renew Settlegoode's contract, she explained: "I read through all of . . . [Winthrop and Crebo's] evaluations and talked to Ms. Winthrop, her supervisor, and to Bob Crebo" before deciding that Settlegoode would not be able to be "a satisfactory teacher." *Id.* at 1395, 120 S.Ct. 2097. This would hardly allow Matarazzo to form an independent opinion of Settlegoode's ability to draft acceptable IEPs. Thus, evidence of Settlegoode's deficiencies in writing IEPs hinged entirely on Winthrop's word, which the jury was certainly entitled to disregard.

At the same time, there is no evidence that defendants discarded or even substantially revised Settlegoode's IEP drafts. Writing IEPs is a dynamic, collaborative process, one that involves a group of parents, teachers and administrators working together to prepare an education program suitable for a disabled child. *See* 20 U.S.C. § 1414(d)(1)(B). No single teacher writes an IEP alone. A

teacher may draft a section of the IEP, but ultimately that section is evaluated by the IEP team and incorporated into an overall program for the student. IEPs are mandated by federal law and create legally enforceable rights and obligations that bind the district and the pupil for at least an entire school year. *See id.* § 1414(d)(2). A school district thus has both the legal obligation and the incentive not to import a poorly drafted section into an IEP. One would expect that a truly inadequate IEP would be substantially criticized, revised or discarded.[3] As one administrator testified, in the Portland schools, inappropriate or substandard IEPs were noted at IEP meetings and corrected. E.R. at 431-32.

Yet the only evidence that anyone ever altered one of Settlegoode's IEPs came from Larry Whitson, who testified that he changed a single page of one of Settlegoode's IEPs recommending Tai Chi for a student. Whitson's changes, however, did not reflect Settlegoode's inability to write IEPs with measurable goals – the main criticism listed in her evaluations – but concerned a substantive disagreement about whether Tai Chi was an appropriate skill for a disabled child to learn.[4]

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[3] As former Assistant Superintendent Matarazzo explained, "[t]he [IEP] is the linchpin of Special Education. . . . [I]f you don't meet the expectations in the IEP you have to provide compensatory services and make sure you get it accomplished. So having a well-written, accurate, appropriate Individualized Education Plan is essential." Tr. of Trial at 1391-92 (No. CV 3-00-313-ST) (Nov. 14, 2001).

[4] Whitson explained: "[T]he IEP team decided that we would write a page for Adapted P.E. that said that [the disabled student] would learn skills in three new . . . recreation areas. It did not rule out teaching Tai Chi. It just allowed us . . . to have a discussion about whether or not that would be appropriate." Tr. of Trial at 1037-38 (No. CV 3-00-313-ST) (Nov. 13, 2001).

Whitson never said Settlegoode's IEP was objectively inadequate or failed to include measurable goals. No other evidence was presented at trial that Settlegoode's IEPs were found to be defective during the IEP process.

Settlegoode presented this argument to the magistrate judge, who rejected it, explaining:

> [P]laintiff reasons that if her IEPs were crucial for her, then they were equally crucial for the students. Thus, if they were as inadequate as Winthrop claims, then defendants would have produced evidence that they disregarded them or corrected them by calling another IEP meeting. *This argument improperly attempts to shift the burden of persuasion from plaintiff to defendants.*

Settlegoode, CV-00-313-ST, at 15 (emphasis added). However, it is clear that the burden in section 1983 claims is, indeed, on defendants to show that they "would have taken the same action even in the absence of the protected conduct." *Keyser,* 265 F.3d at 750.

Even if defendants had shown that Settlegoode's IEPs were inadequate, that still would not have been enough under *Keyser.* Defendants were required to show that they "*would* have taken the same action even in the absence of the protected conduct." *Id.* (emphasis added). Proof that Settlegoode's IEPs were deficient only tells us that the school district *could* have chosen not to renew Settlegoode's contract for reasons independent of the protected conduct. The magistrate judge said almost nothing about this distinction, but it is a crucial one. Defendants, for example, offered no evidence that other teachers had been fired for drafting inadequate IEPs in the past or that it was unusual for new teachers to struggle with IEP writing. To

the contrary, two teachers in Settlegoode's department testified that drafting IEPs is difficult, that it is easy to criticize any IEP and that IEPs would be a good place "to create a paper trail." Tr. of Trial at 133 (CV 3-00-313-ST) (Nov. 6, 2001). As the burden is on the defendants to show Settlegoode's contract would not have been renewed, even if she had kept silent, we cannot agree with the magistrate judge that they made a sufficient showing under *Keyser*.

The jury specifically found, as indicated on the verdict form, that defendants did not "prove[ ] by a preponderance of the evidence that they would not have renewed Dr. Settlegoode's contract for reasons other than Dr. Settlegoode's protected speech." E.R. at 637. In bringing their Rule 50 motion for judgment notwithstanding the verdict, defendants must vault a very high hurdle: They must show that no reasonable juror could have found that the school district *would* have renewed her contract but for her speech. At best, they have shown that whether Settlegoode's inadequate IEPs were the reason for her termination, or whether they were inadequate in the first place, is a close call.[5] In such circumstances, the rule is clear: The verdict trumps.

2. The magistrate judge also held that defendants Winthrop and Crebo are entitled to qualified immunity under section 1983. Public officials are immune from liability for section 1983 damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

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[5] We have considered the magistrate judge's in-depth analysis, including side-by-side comparisons of Settlegoode's and model IEPs. That the magistrate judge had to work so hard in reaching her conclusion alone suggests that this is not the kind of clear-cut case that warrants overturning the jury's verdict.

known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Where plaintiff is a government employee claiming violations of his First Amendment rights, he must show that two things were clearly established: (1) that his speech involved a matter of public concern, and (2) that the interests served by allowing him to express himself outweighed the state's interest in promoting work-place efficiency and avoiding workplace disruption. *Keyser,* 265 F.3d at 747; *see also Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (announcing the balancing requirement for First Amendment claims in the context of government employment).[6] When balancing interests under the second prong of the test, defendants must show "'actual injury to . . . legitimate interests' beyond the 'disruption that necessarily accompanies' such speech." *Keyser,* 265 F.3d at 749(quoting *Johnson v. Multnomah County,* 48 F.3d 420, 427(9th Cir.1995)). The magistrate judge found that

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[6] In *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Supreme Court held that this inquiry must be made in two successive steps: The court must first determine whether "the facts alleged show the officer's conduct violated a constitutional right"; "the next, sequential step is to ask whether the right was clearly established" – an inquiry that "must be undertaken in light of the specific context of the case." *Id.* at 201, 121 S.Ct. 2151. *Saucier* was concerned with "'avoid[ing] excessive disruption of government and permit[ting] the resolution of many insubstantial claims on summary judgment,'" *id.* at 202, 121 S.Ct. 2151 (quoting *Harlow,* 457 U.S. at 818, 102 S.Ct. 2727), and thus established an analytic framework that would enhance the likelihood that claims will be resolved at "'the earliest possible stage in litigation,'" *id* at 201, 121 S.Ct. 2151(quoting *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)). Once the case has proceeded to trial, these concerns fall by the wayside and the *Saucier* sequence is inapplicable. The court, rather, may decide the issues in whatever order it believes would serve the interests of justice in light of the then-existing circumstances.

"plaintiff's speech [was] within the ambit of the First Amendment," and thus was a matter of public concern, *Settlegoode,* CV-00-313-ST, at 30, but held that the balancing of interests under the second prong of the qualified immunity test did not weigh clearly in Settlegoode's favor. The magistrate erred once again.

The magistrate judge started off on the wrong foot by failing to acknowledge the jury's determination of this issue, and thus did not consider the qualified immunity question in light of the demanding Rule 50 standard. The jury here was properly instructed that, "[b]ecause some anger or unhappiness necessarily accompanies speech on issues of public concern, Defendants must prove that the School District suffered an actual injury to its legitimate interests beyond mere disruption of the workplace." E.R. at 540. The jury was also given the appropriate list of factors to consider in making this determination, including "whether Dr. Settlegoode's protected speech impeded the School District's abilities to perform its duties efficiently; . . . the manner, time and place of her protected speech; and . . . the context in which she made the protected speech." Tr. of Trial at 1539-40 (No. CV 3-00-313-ST) (Nov. 15, 2001).

In light of these instructions, the jury's verdict in favor of Settlegoode necessarily reflected a finding that any disruption her comments might have aroused was outweighed by Settlegoode's interest in free expression. Thus, under Rule 50, the magistrate judge should only have found that defendants were protected by qualified immunity if it was "'quite clear that the jury . . . reached a seriously erroneous result.'" *Ace v. Aetna Life Ins. Co.,* 139 F.3d 1241, 1248 (9th Cir.1998) (quoting *EEOC v. Pape Lift, Inc.,* 115 F.3d 676, 680(9th Cir.1997)).

We cannot see how the jury's finding could possibly be deemed "seriously erroneous." There was a strong interest in allowing Settlegoode to express herself. Not only were Settlegoode's core First Amendment rights implicated, but her speech may have had important effects for the disabled students in the district and their parents. Teachers are uniquely situated to know whether students are receiving the type of attention and education that they deserve and, in this case, are federally entitled to. We have long recognized "the importance of allowing teachers to speak out on school matters," *Connick v. Myers,* 461 U.S. 138, 162, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), because "'[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions'" on such matters, *id.* (quoting *Pickering,* 391 U.S. at 572, 88 S.Ct. 1731). This is particularly so with respect to disabled children, who may not be able to communicate effectively that they lack appropriate facilities. Teachers may therefore be the only guardians of these children's rights and interests during the school day. Whether or not Settlegoode's assertions were accurate, or were communicated in the best manner possible, it is clear that the subject matter of her expression was of public importance.

At the same time, the school district presented very little evidence of disruption. Settlegoode's method for conveying her dissatisfaction with the adapted physical education program included sending internal letters and discussing the issue with supervisors. She made her concerns known through proper channels, and made no public statements about the school conditions. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 868 (9th Cir.1999) (a factor to consider when balancing interests under *Pickering* is "whether the speaker directed the

statement to the public or the media, as opposed to a governmental colleague"). We are hard pressed to figure out what Settlegoode could have done that would have been more pleasing to the school district – except, of course, keep quiet.

Moreover, none of the testimony on which the magistrate judge relied shows "actual injury" to the district or to the adapted physical education program in any of the schools. Several teachers said they were hurt or upset by Settlegoode's letter, as one would expect in these circumstances, but there was no evidence that the letter had a "devastating effect . . . on the cohesion of the APE teachers," as the magistrate judge found. *Settlegoode,* CV-00-313-ST, at 33. Gail Reynolds, a teacher in Settlegoode's department, testified that she was "furious," "[o]utraged," and "[u]pset" by the letter, but never described any actual injury to the department. S.E.R. at 94. In fact, she described just the opposite: after the letter, the department called a meeting "to talk about positive outcomes, and how we were going to work together as a team and go forward from here." *Id.* at 95.[7]

A second teacher, Jan Standlea, testified that she was "surprised" by Settlegoode's letter, E.R. at 464, but the rest of her testimony merely confirmed what Reynolds had said – that the letter prompted the teachers to discuss how

[7] It is highly doubtful, in any event, that an adverse reaction of those who are the subject of criticism could sustain a finding of actual injury. It is the nature of criticism that few welcome it and even fewer recognize it as justified. Nevertheless, receiving criticism – even unjust criticism – with grace is part of the job of being a public servant, and if unhappiness with criticism causes job disruption, this may be the fault of those being criticized rather than those doing the criticizing.

better to cooperate with each other and how to improve physical education for disabled students. She explained in great detail the meeting that was held in response to the letter:

Q. Were there ground rules for this meeting?

A. Yes, there were . . . . we established some ground rules with the group on some things, such as not talking over other people, and letting other people say what they needed to say.

And we went through a process where people – each person had one minute to discuss their negative reactions to the paper. And then they had one minute to discuss the positive reaction to the paper.

And then we did some brainstorming of some ways in which we could come together as a team.

Q. Would you look at Exhibit 101?

A. Yes.

Q. Was this something that resulted from the meeting that you've been telling the jury about?

A. Yes, these are the notes that Michelle Chevallier typed up after our meeting was over with the results of our meeting.

Q. Why aren't there negative comments on this document?

A. Because part of this – the main reason for this meeting was to have – develop some group cohesion, so we didn't want to dwell on the negatives. So when the negatives were talked about in the meeting they were not written down.

> So the negative was not to be focused on, to get it out and have that go.
>
> And then when we talked about the positive aspects those were written down because we wanted this to be a positive outcome.

E.R. at 465-66.

The meeting notes further demonstrate that Settlegoode's letter brought the teachers together to help make positive changes to their department and the physical education program, and that many of the teachers agreed with Settlegoode. The notes describe the "[m]any legitimate issues" mentioned in the letter, such as "[a]ccessibility" and "[e]quipment needs," and say that Settlegoode "has a lot of 'guts'" and that the letter "will help us pull together, now we are on 'the same page.'" *Id.* at 248. A reasonable jury could have found that Settlegoode's letter was harmonizing, rather than disruptive.[8]

The administrators who testified also failed to show that Settlegoode's letter was unusually disruptive or caused actual injury. Most of the administrators' testimony commented on Settlegoode's communication style, and reflected frustration with being criticized in such a pointed manner. For example, the principal of the high school said she wanted Settlegoode "out of my building, out of Franklin High School," *id.* at 472, because Settlegoode "did not understand how a high school worked," *id.* at 469. The same principal elaborated that Settlegoode made "charges

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[8] The magistrate judge relied on a third teacher's testimony as well; however, that teacher was never asked about any impact the letter had on the teachers or the school overall. She was only asked about her own reaction to the letter, which was "oh, my gosh." E.R. at 332.

against . . . my staff" and "made demands that they could not fulfill." *Id.* at 471. She described her relationship with Settlegoode as "strained." *Id.* at 473. Nothing in her testimony, however, offered details of injury to the district, such as impaired discipline or control by superiors, conflicts between co-workers or interference with Settlegoode's performance of her duties – factors we generally consider when deciding whether actual injury occurred. *Gilbrook,* 177 F.3d at 867-68. The magistrate judge thus erred when she held that defendants had "prove[d] that plaintiff's speech did significantly disrupt the provision of educational services by the District." *Settlegoode,* CV-00-313-ST, at 33-34.

The magistrate judge also erred in concluding that Settlegoode's First Amendment rights were not clearly established. *See id.* at 35. Whether Settlegoode's First Amendment rights were clearly established "'depends upon the sensitive ad hoc balancing that *Pickering* entails.'" *Brewster v. Bd. of Educ.,* 149 F.3d 971, 980 (9th Cir.1998). We must therefore consider whether, under the governing law, a reasonable jury could have found that "'the outcome of the *Pickering* balance so clearly favored . . . [plaintiff] that it would have been patently unreasonable for the school officials to conclude that the First Amendment did not protect [her] speech.'" *Id.*[9] As we explain above, the jury was more than reasonable in finding that the interests served by allowing Settlegoode

[9] It is not clear that the jury was instructed on this issue, and it would have been defendants' responsibility to offer such instructions and object if the magistrate judge refused to give them. However, because Settlegoode has not raised this on appeal, the issue is waived. *See Dilley v. Gunn,* 64 F.3d 1365, 1367 (9th Cir.1995).

to express herself outweighed any minor workplace disruption that resulted from her speech. Furthermore, it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters. *See Connick,* 461 U.S. at 162, 103 S.Ct. 1684; *Pickering,* 391 U.S. at 572, 88 S.Ct. 1731. It would therefore have been patently unreasonable for Winthrop and Crebo to conclude that Settlegoode's speech was not protected. Winthrop and Crebo were not entitled to qualified immunity from Settlegoode's section 1983 claim.

Because we hold that the magistrate judge's grant of judgment as a matter of law should be reversed with respect to Settlegoode's section 1983 claims, we need not address her other claims. Settlegoode is entitled to the full jury award, including the punitive damages assessed against Winthrop and Crebo under section 1983. She is also entitled to attorney's fees under 42 U.S.C. § 1988, which allows a "prevailing party" "reasonable attorney's fees."

Sanctions

The magistrate judge also granted defendants a new trial because she held that Settlegoode's attorney, Gregory Kafoury, made improper arguments during trial that prejudiced defendants' case. A new trial should only be granted where the "'flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Kehr v. Smith Barney,* 736 F.2d 1283, 1286 (9th Cir.1984) (quoting *Standard Oil Co. of California v. Perkins,* 347 F.2d 379, 388 (9th Cir.1965)). There is an even "high[er] threshold" for granting a new

trial where, as here, defendants failed to object to the alleged misconduct during trial. *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.,* 785 F.2d 656, 658(9th Cir.1986). A higher threshold is necessary for two reasons: "First, raising an objection after the closing argument and before the jury begins deliberations 'permit[s] the judge to examine the alleged prejudice and to admonish . . . counsel or issue a curative instruction, if warranted.'" *Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1193 (9th Cir.2002) (quoting *Kaiser,* 785 F.2d at 658). Second, "allowing a party to wait to raise the error until after the negative verdict encourages that party to sit silent in the face of claimed error." *Id.* We thus review for plain or fundamental error where no contemporaneous objection was made. Plain error review requires: (1) an error; (2) that the error be plain or obvious; (3) that the error have been prejudicial or affect substantial rights; and (4) that review be necessary to prevent a miscarriage of justice. *Id.*

According to the magistrate judge, Kafoury committed misconduct at several points during the trial by ignoring a pretrial order prohibiting evidence as to whether the district's programs for disabled children violated the law. The pretrial order precluded all testimony going to the merits of the district's programs; "the only permissible evidence was whether plaintiff had been retaliated against for making 'good faith' complaints." *Settlegoode,* CV-00-313-ST, at 45-46. The magistrate judge drew a line here that was not particularly clear. It would have been nearly impossible for Settlegoode to show that she acted in "good faith" because she was not raising baseless allegations, without allowing at least some evidence concerning the

school district's programs.[10] We therefore read the magistrate judge's order narrowly and evaluate the specific instances of misconduct cited by the magistrate judge with this conundrum in mind.

The first alleged misconduct came during the examination of Judy Backer, the mother of one of Settlegoode's students. When Settlegoode's counsel called Backer to the stand, defendants objected that Backer's testimony would violate the pretrial order. The court allowed the evidence, so long as it was specifically given "to contradict" Winthrop's testimony that "she . . . secured the ramp at Franklin High School," Tr. of Trial at 1434-35 (No. CV-3-00-313-ST) (Nov. 14, 2001), and not to discuss the quality of the special education program. The magistrate judge faulted Kafoury for "ignor[ing] both the court's specific ruling as to Backer and its general rulings excluding program testimony." *Settlegoode,* CV-00-313-ST, at 47. We read the record otherwise.

Kafoury's brief direct examination of Backer focused almost entirely on the ramp issue, confirming that it was Settlegoode, not Winthrop, who was crucial in obtaining

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[10] In fact, the magistrate judge let in considerable evidence going to the quality of the district's programs. For example, the magistrate allowed Settlegoode to testify about the inadequacy of the district's programs and its alleged discriminatory conduct. Settlegoode's letters, which gave detailed descriptions of what she perceived to be violations of federal law, were also admitted into evidence. During cross-examination of Settlegoode, the magistrate judge admitted "the difficulty I find is that there has been so much testimony by the Plaintiff as to the merits of her complaints that there's a lot of room for cross examination." E.R. at 359-60. In addition, Winthrop, Crebo and Matarazzo were all allowed to testify that Settlegoode's complaints were false and inaccurate because this was supposedly part of their motivation for not renewing her contract. *Id.* at 401.

the ramp. While some of Backer's testimony may have "induc[ed] sympathy for a student with a disability," *id.* at 47, none of counsel's questions specifically elicited this testimony. Moreover, though Backer's testimony may have prompted some sympathy for Settlegoode and her efforts, its substance simply did not violate the pretrial order precluding testimony about the program's merit. Backer described her disabled daughter's enjoyment of tennis, and gave Settlegoode credit for making it possible for the child to participate in the sport. We do not see how this testimony bears on whether the school district's programs complied with the law. And while it may have been slightly off-topic from the ramp issue, we are aware of no authority for the proposition that counsel may never call a witness who may elicit sympathy from the jury while also providing relevant testimony. In short, what counsel did with respect to Backer falls well within the realm of vigorous, ethical advocacy.

The magistrate judge also cites as misconduct several of Kafoury's statements in his closing argument, including some that referred to Backer's testimony. The magistrate first criticized Kafoury's comments that, "[Winthrop] took away the tennis program. Broke the heart of this brave little girl suffering from the most cruel of disabilities. Did it just – just out of spite toward my client." *Id.* at 48. Though this argument may evoke sympathy, it also clearly goes to the heart of Settlegoode's retaliation claim. Settlegoode claimed that, not only was she fired, but her superiors first killed some of her programs in retaliation for her letter. This is a plausible argument in light of the record: Winthrop ended the tennis program, claiming it was "glaringly unsafe," E.R. at 378, just after Settlegoode began voicing her criticisms of Winthrop and the school

district. This is surely an acceptable argument to make in a retaliation case. While counsel used graphic terms such as "brave little girl," "most cruel of disabilities" and "spite toward my client" to make his argument, we see nothing wrong with this. A trial lawyer's job, after all, is to present his client's case in the most sympathetic light consistent with the evidence. Using some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms. Counsel's argument here came nowhere near stepping over the line.

The magistrate judge also took umbrage at several other statements made during Kafoury's closing argument. These statements included Kafoury's use of the "back of the bus" metaphor taken from Settlegoode's letter, and remarks about how football players and dancers were given priority over special education programs because they are more valuable to the school community. We have held that where "offending remarks occurred principally during opening statement and closing argument, rather than throughout the course of the trial," we are less inclined to find the statements pervaded the trial and thus prejudiced the jury. *Kehr,* 736 F.2d at 1286. In any event, Kafoury's statements were not so inflammatory as to be especially troubling. In *Bird v. Glacier Electric Cooperative, Inc.,* 255 F.3d 1136 (9th Cir.2001), a closing argument rose to the level of misconduct where counsel, speaking to a jury comprised only of Indian tribal members, argued that an Indian-owned cooperative's loss of business was part of a legacy of injustice and colonialism and used colorful language to describe that legacy. Plaintiff's counsel argued: "How can they trust any of their work to the likes of unskilled Indian contractors like these? Certainly the white man's magic is so much better . . . . I think

you have seen a classic defense to castrating the . . . laws on the reservation." *Id.* at 1150. Kafoury, by contrast, was not seeking to inflame racial prejudices or even establish any special interest in the rights of the disabled. His comments referred specifically to the evidence admitted at trial, and he directed his comments to defendants and the situation at hand.

The magistrate judge also criticized Kafoury for mischaracterizing one of defense counsel's statements in his closing argument. Defense counsel had said:

> This case is not about the children, and even if you heard things in this case that bothered you, that you wish Portland Public Schools would do differently, there's nothing that you can do with your verdict today that will change those particular cases or things that you thought should have been different.

Settlegoode, CV-00-313-ST, at 51. Kafoury responded: "Defense counsel said this is not about the children. The first thing she said. The second thing she said was, there is nothing you can do. If you don't like what you've heard, we're going to keep doing what we're gonna keep doing, and you can't stop us." *Id.* The magistrate judge held that this was a misrepresentation, when it plainly was not, and that it was inappropriate to urge the jury to "send a message."[11] This case, however, involves a claim for punitive

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[11] The magistrate judge also disapproved of another portion of Kafoury's closing argument, which also urged the jury to "send a message" to the district. Kafoury argued:

> And the question is whether you want to use this opportunity not just to do justice in this case, which sorely needs some justice, but whether you want to use this opportunity to give some power, some breathing room to those who want

(Continued on following page)

damages. Reminding the jury that they have the capacity to deter defendants and others similarly situated is certainly legitimate where punitive damages are at stake. Indeed, the magistrate judge instructed the jury that "[p]unitive damages may be awarded . . . to punish the wrongdoer and to *discourage the Defendant and others* from engaging in wanton misconduct." Tr. of Trial at 1547 (No. CV 3-00-313-ST) (Nov. 15, 2001) (emphasis added). *See also Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir.1991) (holding that counsel's actions did not rise to the level of misconduct where his closing argument called for "punishment" and to "make sure . . . [defendants] never forget about [the accident]"). A closing argument that tracks the jury instructions cannot possibly be misconduct.

The magistrate judge also held that Kafoury committed misconduct when he claimed defense witness testimony had been scripted and rehearsed by defense counsel. The magistrate judge cited no authority for the proposition that counsel may not assert that an opposing party's witness has been coached, and we're aware of none. Where counsel believes that testimony came out sounding too stilted or polished, we see nothing objectionable in suggesting to the jury that the witness may have been parroting words scripted by someone else. Nor is there anything objectionable about Kafoury's argument that the school district employees had been told to make paper trails to

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to make things better, to those who want to be advocates for kids, or whether you want to strengthen the dead hand of this bureaucracy whose face you've seen.

Settlegoode, No. CV-00-313-ST, at 52-53. For the reasons explained in text, we believe this statement was proper.

cover their tracks. After all, this kind of thing happens all the time, and there was evidence showing that school district lawyers were involved prior to Settlegoode's termination. That Kafoury had no direct evidence supporting these arguments is of little consequence; circumstantial evidence and inference are sufficient to support a legitimate argument. Kafoury is not a prosecutor, subject to "constraints and responsibilities that don't apply to other lawyers." *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir.1993). As an advocate in a civil lawsuit, he was perfectly entitled to argue that the jury should disbelieve the opposing party's witnesses for any number of reasons, including that they may have been guided by advice of their lawyers. The sanction for making such an argument is that it may boomerang if it does not resonate with the jury.[12]

The magistrate judge found that, taken together, the various instances of misconduct were sufficiently prejudicial

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[12] The magistrate judge cited several other instances of alleged misconduct. For example, the magistrate pointed to the fact that Kafoury "twice told the jury that the length of testimony in plaintiff's deposition and arbitration was 1,400 pages" when really it was just under 300 pages. *Settlegoode,* CV-00-313-ST, at 62. The magistrate also claimed Kafoury improperly tried twice to ask Settlegoode's doctor whether he agreed with defendant's expert witness that scientific evidence is not sufficient to prove stress causes Graves' Disease, one of the ailments that Settlegoode complained of, even though the court had previously ruled the doctor could not testify as a medical expert. The magistrate judge sustained objections to these questions, and removed damages stemming from Graves' Disease from consideration of the jury, but nevertheless held that Kafoury's questions amounted to misconduct. Finally, the magistrate judge held that Kafoury improperly tried to impeach the high school principal by criticizing her performance as principal. Defendants objected and the objection was sustained. We cannot see how any of this conduct, individually or taken together, amounts to misconduct worthy of the magistrate's attention.

to defendants' case as to merit a new trial. Even if we were to find that any misconduct occurred – and we have identified none – Kafoury's conduct at trial could not have possibly affected defendants' substantial rights. Even in cases where the trial court has found counsel's behavior is "outrageous," we've found no prejudice. *See Kehr,* 736 F.2d at 1285. Given that most of counsel's statements were limited to his closing argument, which was well within the bounds of fair advocacy, and there was more than sufficient evidence for the jury to find in Settlegoode's favor, we hold that the magistrate judge abused her discretion in ordering a new trial.

Conclusion

We reverse the district court's judgment and remand with instructions that the court enter judgment for plaintiff consistent with the verdict, plus post-judgment interest and attorney's fees pursuant to 42 U.S.C. § 1988. We refer the case to the Appellate Commissioner for a determination of Settlegoode's attorney's fees on appeal.

REVERSED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DR. PAMELLA E. SETTLEGOODE, Plaintiff, v. PORTLAND PUBLIC SCHOOLS, Multnomah School District No. 1; SUSAN WINTHROP; ROBERT CREBO; and LARRY WHITSON, Defendants.	)	CV-00-313-ST OPINION

STEWART, Magistrate Judge:

INTRODUCTION

Plaintiff, Dr. Pamella E. Settlegoode, was an Adaptive Physical Education ("APE") teacher who taught physical education to students with disabilities for defendant Portland Public Schools ("the District") for the 1998-99 and 1999-2000 school years. In June 1999, plaintiff began reporting incidents and situations of what she perceived to be discrimination against students with disabilities with respect to equipment, facilities, and services, as well as improper employee conduct, including falsified reports or lack of required reports, mismanagement of funds, and other violations of the law. In March 2000, the District declined to renew her probationary contract for the 2000-01 school year. By failing to renew her contract, plaintiff alleges that the District and its employees, Susan Winthrop ("Winthrop"), Robert Crebo ("Crebo") and Larry Whitson ("Whitson"), retaliated against her. Accordingly,

plaintiff alleges that all defendants violated § 504 of the Rehabilitation Act, 29 USC § 794 (Claim One), and 42 USC § 1983 ("§ 1983") based on a violation of her First Amendment free speech rights (Claim Two). She also alleges that the District violated the Equal Pay Act (Claim Three) ORS 659.530 and Oregon's Whistleblower Act, ORS 659.530 (Claim Four).

Before trial, plaintiff voluntarily dismissed her claim for violation of the Equal Pay Act (Claim Three) and all claims against Whitson. The remaining claims were tried for eight days before a jury. On November 16, 2001, the jury returned a verdict in plaintiff's favor on all claims and awarded her the full amount of damages she sought on each claim, namely $500,000 non-economic damages, $402,000 economic damages, and $50,000 punitive damages against both Winthrop and Crebo for violating § 1983 (Claim Two).

Now pending before the court are defendants' Motions for Judgment as a Matter of Law, Mistrial, and New Trial (docket #156). For the reasons set forth below, those motions are granted in part and denied in part, and the court directs entry of judgment in favor of defendants.

ANALYSIS

Defendants have filed a total of 11 separate post-trial motions. The first seven of these motions request judgment as a matter of law on each claim for different reasons, on the punitive and non-economic damages, and on all claims due to the conduct of plaintiff's attorney. Three of the remaining four motions request, in the alternative, a new trial and the final motion requests, in the alternative,

a limitation of the judgment on the Whistleblower Act Claim.

I. Legal Standards

A. Motion for Judgment as a Matter of Law

Pursuant to FRCP 50(a), a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." A court may, however, reserve decision on the legal issues presented until after a jury renders its verdict when the motion may be renewed. FRCP 50(b).

The trial court can set aside the jury verdict and grant judgment as a matter of law "only if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F3d 1276, 1282 (9th Cir 2001). In other words, judgment as a matter of law should not be granted unless:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded [persons] could not arrive at a verdict against [it].

Meloff v. New York Life Ins. Co., 240 F3d 138, 145 (2nd Cir 2001).

The Supreme Court has set forth the following standard for the court to apply when a losing party moves to set aside a jury verdict:

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . ."Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . .That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses."

Reeves v. Sanderson Plumbing Prods., Inc., 530 US 133, 150-51 (2000) (citations omitted). Thus, after reviewing all of the evidence and disregarding all evidence favorable to the moving party except that which the jury is required to believe, the court must ask:

> whether a fair-minded jury could return a verdict on the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by [clear and convincing] evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 US 242, 252 (1986).

B. Motion for New Trial

The party moving for judgment as a matter of law under FRCP 50(b) may join an alternative motion for a new trial under FRCP 59. Where both motions are before the court following a jury verdict, the court may either "(A) allow the judgment to stand; (B) order a new trial, or (C) direct entry of judgment as a matter of law." FRCP 50(b)(1). If the court grants the renewed motion for judgment as a matter of law, then it "shall also rule on the motion for a new trial . . . and shall specify the grounds for granting or denying the motion for the new trial." FRCP 50(c)(1).

A new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law." FRCP 59(a). Although substantial evidence supporting the verdict bars a judgment as a matter of law, the court has a duty to grant a new trial if the verdict is against the clear weight of the evidence such that the court "is left with the definite and firm conviction that a mistake has been committed by the jury." *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F2d 1365, 1371 (9th Cir 1987). The court need not presume that the verdict is correct nor view the evidence in the light most favorable to the prevailing party. *Id.* Instead, the court must weigh the evidence and assess for itself the credibility of the witnesses. *Murphy v. City of Long Beach,* 914 F2d 183, 187 (9th Cir 1990).

A new trial also may be granted based on the prejudicial misconduct of counsel during trial. *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F3d 337, 345-47 (9th Cir 1995). In *Anheuser-Busch,* the Ninth Circuit affirmed the trial court's grant of a new trial because the opposing

counsel violated the court's ruling on motions *in limine* which excluded certain evidence and using inadmissible evidence in the closing argument in an inflammatory manner. The violation of the evidentiary rulings left the unrebutted impression that the defendant continued to wrongfully interfere in business contracts and prejudiced the jury. *See also Sasaki v. Class,* 92 F3d 232, 236-38 (4th Cir 1996) (ordering new trial because of improper reference by the plaintiff's counsel in closing argument to the federal statutory cap on non-economic damages that could have substantially influenced the jury verdict); *Brown v. Royalty*, 535 F2d 1024, 1028 (8th Cir 1976) (holding that trial court erred in denying motion for new trial where counsel made references to evidence that the court had held in a pretrial order was inadmissible, despite giving a curative instruction).

Attorney misconduct warrants a new trial where the "'"flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict."'" *Anheuser-Busch*, 69 F3d at 346, quoting *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F2d 1283, 1286 (9th Cir 1984), quoting *Standard Oil Co. of Cal. v. Perkins*, 347 F2d 379, 388 (9th Cir 1965). When the case is a close one, there is an enhanced possibility that improper conduct influenced the jury verdict. *Silbergleit v. First Interstate Bank of Fargo, NA.*, 37 F3d 394, 398 (8th Cir 1994) (finding new Trial warranted on the basis of a question by counsel that placed prejudicial information before the jury). Moreover, the court should focus "not only on counsel's conscious impropriety, but on the nature of the information that counsel attempted to bring before the jury." *Id.*

An objection prior to the jury's verdict is not required if the misconduct constitutes "a plain or fundamental error." *Bird v. Glacier Elec. Coop., Inc.*, 255 F3d 1136, 1148 (9th Cir 2001) ("We will review for plain or fundamental error, absent a contemporaneous objection or motion for a new trial before a jury has rendered its verdict, where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question"). In fact, improper argument may be so inflammatory that admonishing the jury to disregard the argument cannot prevent prejudice because it cannot unring the bell. *Ayoub v. Spencer,* 550 F2d 164, 170 (3rd Cir), *cert denied*, 432 US 907 (1977).

II. Motion for Judgment as a Matter of Law on Claim One (Motion 1)

Pursuant to FRCP 50(b), the District moves for the entry of judgment as a matter of law in its favor on Claim One alleging retaliation in violation of the Rehabilitation Act because plaintiff has no standing and did not sufficiently prove that the District would have renewed her contract if she had not complained about the treatment of special education students. This court finds that plaintiff has standing under the Rehabilitation Act, but failed to prove causation.

A. Plaintiffs Standing

The Rehabilitation Act provides in § 504 that:

> No otherwise qualified *individual with a disability* in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation

> in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 USC § 794(a) (emphasis added).

Plaintiff is not an "individual with a disability" as defined by the Rehabilitation Act, but is a teacher of students with disabilities. However, another provision of the Rehabilitation Act states that its remedies "shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance." 29 USC § 794a(a)(2). Defendants argue that no Ninth Circuit authority grants a teacher of students with disabilities standing to bring a claim under the Rehabilitation Act under either provision.

The Ninth Circuit did allow an organization of deaf individuals to bring an action under the Rehabilitation Act related to a Los Angeles County court's refusal to provide sign-language interpreters to enable deaf citizens to serve as jurors. *Greater Los Angeles Council on Deafness, Inc. ("GLAD") v. Zolin*, 812 F2d 1103 (9th Cir 1987). Although the Ninth Circuit agreed that the organization had standing, it explained in a footnote that the claim was "a question of GLAD's entitlement to relief under section 504 more than a question of Article III standing to sue." *Id*, 812 F2d at 1115 n18. The court held that GLAD had standing based on its claim to recover for expenses incurred to secure an interpreter for a deaf person. Because GLAD was organized "for the benefit of hearing-impaired persons," it could maintain a claim for damages under § 504 of the Rehabilitation Act. *Id* at 1115.

According to defendants, the same analysis does not apply in this case. Plaintiff is not seeking to recover any

expenses she has incurred for the benefit of disabled students. Rather, her damages are personal, and as a result, she cannot seek to extend the bounds of the Rehabilitation Act to bring a personal claim.

In response, plaintiff points to cases from other circuits allowing individuals to bring claims under the Rehabilitation Act. *Weber v. Cranston Sch. Comm.*, 212 F3d 41 (1st Cir 2000) (granting standing to a mother to pursue her retaliation claim under § 504); *Hoyt v. St. Mary's Rehab. Ctr.*, 711 F2d 864, 865 (8th Cir 1983) (finding that plaintiff, as the "next friend and daily visitor" of the disabled patient, had standing to assert a claim of retaliation against her personally for her complaints to the hospital on behalf of the patient); *Whitehead v. School Bd. for Hillsborough Cty.*, 918 F Supp 1515, 1522 (MD Fl 1996) (granting standing to the parents of a child with Down's Syndrome who sought damages under § 504 for retaliation against them in their capacity as parents); *Ross v. Allen*, 515 F Supp 972, 976 (SDNY 1981) (granting standing to a school psychologist who was dismissed after she complained to the Board of Education about the suspension of a deaf student for behavioral problems).

With respect to standing, this court is persuaded by the following analysis of the First Circuit:

> The Rehabilitation Act extends its remedies to "any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under section 794 of this title." 29 U.S.C. § 794a(a)(2). Courts have construed the phrase "any person aggrieved" as an expression of Congressional intent to accord standing to the fullest extent permitted by the case and controversy provision of Article III. . . .Consistent with the broad

> construction of the statutory enforcement language of Title VI and the Rehabilitation Act, the anti-retaliation regulation applies to "any individual" who has been intimidated, threatened, coerced, or discriminated against "for the purpose of interfering with [protected rights]" under Title VI of the Civil Rights Act or the Rehabilitation Act. 34 C.F.R. § 100.7(e); see id. § 104.61 (incorporating the Title VI anti-retaliation regulation into the Rehabilitation Act).
>
> * * *
>
> Although Congress could have limited the remedial provisions of the Rehabilitation Act to claims brought by or on behalf of disabled individuals, it did not do so in apparent recognition of the fact that disabled individuals may need assistance in vindicating their rights from individuals *who may* have their own claim to relief under the Act. The anti-retaliation regulation set forth in 34 C.F.R. § 100.7(e) is consistent with this recognition. It is a practical reality that recipients of federal funds sometimes respond to complaints about their treatment of a disabled child by retaliating against the disabled child, the initiator of the complaint (who is often a parent), or both.

Weber, 212 F3d at 48-49 (citations omitted).

Considering the language of the Rehabilitation Act and the authorities cited above, this court concludes that plaintiff has standing to sue in her own capacity for retaliation suffered as a result of complaining about the treatment of students with disabilities. She is clearly a "person aggrieved" within the meaning of the Rehabilitation Act. Thus, defendants' motion for judgment as a matter of law on Claim One for lack of standing is denied.

B. Sufficiency of Proof

The Ninth Circuit has not determined whether the Title VII burden-shifting scheme applies to a claim brought by an individual without a disability complaining of retaliation under the Rehabilitation Act. However, as set forth in the Jury Instructions to which plaintiff took no exception, this court concluded that the Title VII standard applies to this claim. *See Bennett v. Henderson,* 15 F Supp2d 1097, 1112 (D Kan 1998), *aff'd* 172 F3d 62 (10th Cir 1999) ("The elements of the prima facie case of retaliation are the same whether a plaintiff proceeds under the Rehabilitation Act, ADA, ADEA, or Title VII"). As a result, plaintiff had the burden of proving:

1. She engaged in an activity protected by the Rehabilitation Act;

2. The District subjected her to an adverse employment action (the nonrenewal of the probationary contract); and

3. The District would have renewed the probationary contract but for plaintiff engaging in the protected activity.

The first two elements are the same as the first two elements necessary for a plaintiff's *prima facie* case under the traditional Title VII analysis, at which point, consistent with the *McDonnell-Douglas* analysis, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. *Ruggles v. California Polytechnic State Univ.,* 797 F2d 782, 786 (9th Cir 1986). The plaintiff must then prove "by a preponderance of the evidence that the proffered reasons are pretexts for retaliation or that a

discriminatory reason more likely motivated the employer's action." *Id.*

> If plaintiff succeeds at this point, a presumption is created that the adverse employment decision was the product of retaliatory intent. The defendant may rebut this presumption by showing by a preponderance of the evidence that the adverse action would have been taken even in the absence of discriminatory or retaliatory intent.
>
> This final stage in the allocation of proof allows a defendant to show that the plaintiff would not have been hired, or would have been fired, regardless of the retaliatory motives of the employer. This is essentially a question of causation, the courts having recognized that a plaintiff garners a windfall if she receives the panoply of Title VII compensatory remedies without proof that she would have obtained the job. Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise. . . . This rule of causation has been applied to employment decisions involving First Amendment claims of protection, . . . as well as to discrimination claims under Title VII. It applies equally to retaliation claims under Title VII.

Id (citations omitted).

This question of causation is the third element that plaintiff must prove in order to prevail on Claim One. The District concedes that plaintiff proved the first two prongs of a Title VII analysis, but contends that she failed to prove the third. On the issue of causation, the District points to its Final Report on Probationary Teacher (Exhibit 525) which gave the following three reasons for not

renewing plaintiff's probationary contract: (1) her inability to write IEPs; (2) her inability to teach to a group; and (3) her communication style, which was marked by personal attacks, insults, and sarcasm. On their face, each of these reasons is legitimate and nondiscriminatory.

Both Winthrop and Carol Matarazzo (former Assistant Superintendent for the District) ("Matarazzo") testified that each of these reasons on its own was sufficient for the District to decide not to renew plaintiff's contract. On that point, their testimony was unrebutted by any cross-examination or by any other witness. Although Winthrop is a defendant and therefore an interested witness whom the jury was not required to believe, Matarazzo is not. Since she retired from the District in June 2000, she no longer has any personal interest in the outcome of this case. In fact, some of her testimony was favorable to plaintiff. Because her testimony on this point stands unrebutted and unimpeached, it cannot be disregarded. Thus, the issue with respect to causation is whether plaintiff *produced* sufficient evidence to rebut all three of the District's legitimate nondiscriminatory reasons.

1. Inability to Write IEPs

The District submitted evidence of plaintiff's failure to write adequate IEPs, both during her first year before her written complaints of June 11 and 16, 1999 (Exhibits 608-610) and during her second year (Exhibits 611-621). Plaintiff's supervisor, Winthrop, as well as plaintiff's own witness Jane Hubbard ("Hubbard"), another APE, testified that the standard for measurable levels of educational performance, goals, and objectives that the District sets for writing IEPs has existed since at least 1997. Winthrop

gave these guidelines in writing to plaintiff (Exhibit 624) and also testified that she met with plaintiff to attempt to improve her ability to write IEPs, gave her access to a bank of IEPs, and even provided her with sample IEPs, which plaintiff confirmed.

Several witnesses, including plaintiff's witnesses, described IEPs as the cornerstone of special education and stated that in APE, the need for clarity in writing IEPs was especially important because APE teachers are itinerant, and on the days when plaintiff was not in the schools, the APE curriculum was continued by the classroom special education teachers, as well as by the Educational Assistants ("EAs"). By referring to a number of examples, Winthrop explained why plaintiffs drafting of IEPs was deficient. Her exhaustive trial testimony reviewing the IEPs prepared by plaintiff was completely uncontradicted. Plaintiff's counsel asked her no questions concerning plaintiff's IEPs which she criticized.

Because Winthrop is a defendant and therefore an interested witness, the jury was entitled to disbelieve her. However, plaintiff still had the burden to prove that Winthrop's criticism of her IEPs was retaliation for plaintiff's protected activities. Yet she offered no evidence that Winthrop's evaluations and conclusions related to the IEPs were a mere pretext. The only evidence that plaintiff presented was that IEPs are difficult to write and that if someone wanted to find an aspect on which to criticize an individual, the drafting of IEPs could be one. She presented no expert witness or supervisor or other qualified witness who, based upon a review of the IEPs drafted by plaintiff, could testify that they met acceptable standards. Although plaintiff points to the closing argument of her counsel characterizing the testimony of Hubbard (who was

neither a supervisor nor an expert related to IEPs) as providing support for plaintiff's IEPs being "good," the actual trial transcript reveals that Hubbard did not comment at all on plaintiffs ability to write IEPs. Excerpt 21, Testimony of Jane Hubbard, pp. 8-12.

To overcome this lack of evidence, plaintiff makes several arguments. First, she points to her performance evaluations to show a lack of written criticism of her ability to write IEPs. She received two performance evaluations from Winthrop during her first year before she made her complaints in June 1999: the first dated November 30, 1998 (Exhibit 511) and the second dated February 22, 1999 (Exhibit 513). In both evaluations, plaintiff met all minimum standards, including Section 1(3) which reads: "Plans, develops and completes IEPs according to District and State guidelines and policies." Winthrop's explanatory comment to the first evaluation states that plaintiff "is working to develop her skills in writing IEP goals and objectives which are measurable. She has not yet had opportunities to prepare evaluation reports." Her comment to the second evaluation states that plaintiff "accurately relays gross motor information in her evaluation reports. She is working on reporting information in a more succinct manner."

Yet in her performance evaluation dated February 23, 2000 (Exhibit 525), during her second year of teaching after plaintiff began making complaints, Winthrop found plaintiff deficient in Section 1(3). Winthrop's comment states that plaintiff "continues to write IEP goals that are not measurable. Present Levels of Performance (PLOP) do not consistently include baseline information and goals do not indicate degree of improvement." Despite this supposed deficiency, plaintiff notes that she met minimum

standards overall for Section 1 and argues that criticism of her IEPs in her second year can only be ascribed to Winthrop's retaliatory motive.

The problem with this argument is that Winthrop did criticize plaintiff's IEPs during her first year. In fact, Winthrop's explanatory comment on the first evaluation confirms that plaintiff was not yet proficient in writing IEP goals and objectives which were measurable. Winthrop and Matarazzo also testified without contradiction that first year teachers are given a great deal of support and the benefit of any doubt, but are evaluated much more closely during the second year. Furthermore, the record contains observation notes by Winthrop dated October 26, 1998 (Exhibit 508), listing four areas for plaintiff to work on, including "writing measurable goals/objectives" to be discussed at a meeting the next day. The record also contains three IEPs written by plaintiff during her first year (Exhibits 608-610), one of which contains Winthrop's critical notes. Plaintiff's IEPs changed little during her second year (Exhibits 611-620) and Winthrop's notes continue to be critical of the same problems in both years. In other words, the documents themselves reveal insubstantial improvement in plaintiff's IEPs from her first year to her second year.

Second, plaintiff reasons that if her IEPs were crucial for her, then they were equally crucial for the students. Thus, if they were as inadequate as Winthrop claims, then defendants would have produced evidence that they disregarded them or corrected them by calling another IEP meeting. This argument improperly attempts to shift the burden of persuasion from plaintiff to defendants. Plaintiff, not defendants, must prove that her inability to write IEPs was a pretext for her nonrenewal.

Third, plaintiff contends that the only evidence critical of her IEPs was Winthrop's testimony which must be disregarded in its entirety. Because Winthrop is an interested witness, the jury clearly was entitled to disbelieve her, and this court must disregard her testimony to decide a motion for judgment as a matter of law. *Reeves,* 530 US at 150-51, Nevertheless, merely disregarding Winthrop's testimony does not mean that plaintiff prevails. As recognized by the Supreme Court:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. . . . To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "treat discrimination differently from other ultimate questions of fact."

Id at 147 (emphasis in original; citations omitted)

The facts of this case are clearly distinguishable from the facts in *Reeves*. In *Reeves,* the Supreme Court reversed on the basis that the appellate panel failed to take into

account the plaintiff's evidence supporting his *prima facie* case when considering the overall sufficiency of the evidence to support his age discrimination claim. The Supreme Court found substantial evidence demonstrating that the employer's explanation for his firing was patently false and pointed to comments and conduct of the defendant's supervisor reflecting age-related animus. Here, there is no comparable evidence supporting plaintiff's *prima facie* case or any other evidence to call into question the District's criticism of plaintiffs IEPs. Indeed, this case falls squarely within the exception noted in *Reeves* in which the plaintiff fails to carry her "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff" *Id* at 148.

Even disregarding Winthrop's testimony, the District is nonetheless entitled to judgment as a matter of law "if the record conclusively reveal[s] some other, nondiscriminatory reason for [its] decision." *Id.* The record here does just that.

The District's IEP guidelines state that the "assessment information stated in the PLOP [Present Level of Educational Performance section] becomes the baseline data for establishing the annual goal." Exhibit 624. In addition, those guidelines specify that both the "Annual Goal" and "Objectives" sections in IEPs must be "measurable." *Id.* The "Annual Goal" is also required to be "easy for parents to understand and must reflect what a student can reasonably achieve in ONE YEAR." *Id* (emphasis in original). The guidelines give a model for the Annual Goal, which includes four parts, namely: (1) direction of progress (increase/decrease); (2) behavior or skill; (3) degree (grade/achievement) to which student will achieve; and (4) the evaluation tool. *Id.* The guidelines give a similar model for

Objectives, which includes four parts: (1) an observable behavior; (2) the condition under which the behavior will occur (listed as "optional"); (3) the criteria for performing the behavior; and (4) the evaluation schedule. *Id.*

The guidelines obviously require the person preparing the IEP to document in the PLOP the student's baseline ability in the particular skill. Without such baseline information, it is impossible to track the improvement in the specified area. The Annual Goal and Short-Term Objectives for the student must be "measurable." In other words, just by reading the baseline information given in the PLOP, and then reviewing the "measurable" Annual Goal and Short-Term Objectives sections of the IEP, a reader should be informed of both the student's current skill level as well as the *measurable* goals for both short-term and annual improvement by that student.

The IEP prepared by plaintiff on or about November 23, 1998, for student "N.J." clearly does not meet that standard. The PLOP section states:

> [Student] enjoys sharing and engaging in physical activities; [student] likes to be of help to others; in many activities [student] exhibits good skills. [Student's] time [and] attention on-task oftentimes interferes with progress [and] accuracy; needs pos[itive] reinforcers (*e.g.* praise) freq[uently]; social-conflicts disrupt performances; seeks out one on one repetitions.

Exhibit 608.

The Annual Goal in the same IEP states:

> [Student] will develop the skills needed to participate in 3 lifetime activities instructed, including one that is fitness-based as demonstrated

> during practical examination (tennis, [weight] train[ing] [and] self defense).

Id.

Those descriptions do not provide any information concerning the student's present abilities, the means by which to measure improvement, or the goal for the ensuing year.

Similarly, the IEP prepared by plaintiff on or about June 9, 1999, is lacking this information. The PLOP section states:

> [Student] continues to be enthusiastic about participating in PE with [student's] peers; [student] particularly enjoys individual sports and sporting activities. The characteristics of [student's] CP and visual limits compromise [student's] successes in *all* aspects of gross motor coordination.

Exhibit 609.

The Annual Goal states:

> [Student] will increase [student's] skills and participation (with minimal support) in 4 lifetime activities [and] sports as measured by practical examinations,

Id.

Again, this PLOP and Annual Goal fail to indicate the student's current skills level or an annual goal for the student.

Finally, the IEP prepared for student "A.M." on or about June 11, 1999, gives the following PLOP narrative:

> [Student] desires to participate in Physical Education with [student's] peers; [student] enjoys individual sports [and] athletic competition (track and field), however, the characteristics of [student's] MR limit her successes in the regular PE curriculum.

Exhibit 610.

The Annual Goal in that IEP is nearly identical to the Annual Goal in Exhibit 609 and states:

> [Student] will increase [student's] skills [and] knowledge through participation (with minimal support), in 4 lifetime activities [and] sports as measured by practical examinations.

Id.

None of these PLOP or Annual Goal narratives gives any information concerning the student's abilities in a particular skill area or any "measurable" annual goal identifying what the student "can reasonably achieve in one year."

While the Objectives section in Exhibit 608 contains several specific activities with "measurable" goals (one exception is that "speed force accuracy target" is not "measurable" without defining "target"), *ie*, 8 out of 10, accuracy of 5 parts *etc*, for the most part, Exhibits 609 and 610 do not. Instead, they give general categories of activities, *ie*, "regime of activities," "movement activities," "track and field activities," "hiking activities," "tennis," "weight training," *etc*, and list target percentages of "increase," "accuracy," and "participation." These Objectives thus never identify the specific "observable behavior" called for in the guidelines, and without information on the student's

baseline abilities, are meaningless when speaking in terms of "increase."

A comparison of the IEPs for student "S.H." at Grant High School, one prepared by Judy Wright ("Wright") with input from S.H.'s mother and others on or about December 8, 1998 (Exhibit 621), and one prepared by plaintiff on or about February 19, 1999 (Exhibit 620), highlights the shortcomings of the IEP prepared by plaintiff. The PLOP in the IEP prepared by plaintiff states:

> [Student] exhibits enthusiasm for participating in Phsyical [sic] Education [and] being with his peers; he also enjoys being helpful (*e.g.* carrying equipment). Classroom observations indicate that characteristics of [student's] autism conflict with [student's] capacity to express [and] follow instructions; needs frequent reinforcement to stay on-task.

Exhibit 620.

The Annual Goal in that same IEP provides:

> [Student] will increase his participation and practice at locomotion [and] object control skills as demonstrated by time on task [and] completion of request to 70%.

Id.

In comparison, Wright's PLOPs and Annual Goals identify the specific skill, the student's current ability in that skill, and a measurable annual goal:

PLOP:

> [Student] has difficulty balancing on one foot for more than 15 seconds. [Student] is unable to walk heel to toe. [Student] is unable to walk on

> the insides of his feet or on the outsides of his feet to complete warm-up exercises for Track. [Student] needs a model, physical assist, and verbal cues.

Exhibit 621, p. 2.

> Annual Goal:
>
> [Student] will perform balance activities increasing the time/distance by 10% intervals and the independence level by 25% intervals until mastery.

Id.

> PLOP:
>
> [Student] is able to skip and able to raise his knee to hip level, but cannot do both at once. [Student] is unable to do Karaoke steps (alternating steps sideways with foot placed behind each time). [Student] is able to run on [student's] toes (quick step) but not fast enough to complete Track/C.C. warm-ups. [Student] needs a model, physical assist and verbal cues.

Id at 3.

> Annual Goal:
>
> [Student] will exhibit agility by executing motor coordination activities increasing speed/steps by 10% intervals and the independence level by 25% until mastery.

Id at 4.

PLOP:

[Student] is able to jog 60 minutes continuously, but complains frequently.

Id.

Annual Goal:

[Student] will exhibit cardio-respiratory endurance by maintaining a jog pace for 60 minutes continuously to demonstrate stamina and endurance, while decreasing complaints.

Id.

The remaining pages of Exhibit 621 are similar.

There is an even sharper contrast between the Objectives sections of those same IEPs. Plaintiff's IEP states that the student will "stay within defined areas of the gym or playing field" 100% of the time. Exhibit 620. The remaining activities, for which the criteria is "80% of the time" or "80% with prompt" are that the student will:

- "participate in each section of instruction";
- "comply with teacher or peer request to join activity";
- "help hand out equipment and in putting it away";
- increase time on task and completion of drills"; and
- increase practice of locomotion skills" *Id.*

In contrast, Wright sets forth numerous specific activities such as:

- "maintain balance while standing on one foot for 2 minutes" (Exhibit 621, p. 2); "[p]erform 'quick step' (run on toes very rapid)" (*id* at 3);
- "[j]og continuously for 60 minutes with decreasing complaints" *(id* at 4);
- "[p]erform stretch of hamstring and Achilles heel tendon, adapted as necessary, with correct form" (*id*);
- "[j]ump forward with 2 feet 48 in[ches]" *(id* at7).

Each individual activity gives a specific percentage goal for independence (0% to 100% independently) for a particular activity. *Id* at 2-7.

Plaintiff argues that the measurement of proficiency in areas such as dance, Tai Chi, and self-defense is *qualitative.* However, not one of the areas identified by plaintiff is incapable of being objectively measured. Dance, Tai Chi, and self-defense all can be broken down into specific movements. It does not take special training in APE to know that a child's initial ability can be documented by a skills test, and measurable goals can be set by requiring a specific number or type of movements over a particular time frame. Plaintiffs own IEP suggests that self-defense can be broken down. *See* Exhibit 608 ("self defense skill – performing 3 kicks, 3 handstrikes [and] 3 escapes").

Plaintiff proffers reasons as to why she could not and did not sufficiently write IEPs. She blames her newness to the position, inadequacy of current curriculum, inadequate IEPs written by previous teachers, and the uniqueness of the programs she taught. However, plaintiff testified to none of these excuses during trial.

Plaintiff's counsel also attempted to explain at oral argument that plaintiff's IEPs were adequate because she instituted new programs with an implied baseline of zero, could use percentage of accuracy as a measure, and had difficulty providing IEPs that received approval of the IEP team. However, this argument is not supported by any testimony from plaintiff or any other witness. Furthermore, if the level of skill the student initially possesses is assumed to be zero, the initial measurement of "improvement" will appear dramatically higher than later measures of "improvement."[1]

Moreover, many of the specific skills in each of these areas (*ie*, the "kicks" identified as a self-defense move by plaintiff) are skills the student may naturally know how to do, or may have learned without any specific training. It defies logic that students would have absolutely no skills in several of these areas. If they can identify basic body parts and follow simple instructions, many of the very basic first things learned in a dance, Tai Chi, or self-defense class would be ones they could do. Presumably, the purpose for identifying the student's initial level of performance is to make it possible to track the student's performance over time. This goal is thwarted (or perhaps can only be achieved) by using the initial measure of "improvement" as a baseline.

In sum, a comparison of these two IEPs, particularly in light of the District's guidelines, amply demonstrates

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[1] For example, if the student is assumed to be unable to perform any self defense movements at all, and then after instruction at the first class successfully performs 10 out of 20 blocking movements, the initial "improvement" will be 50%, and if the student performs 12 blocking movements at the next class, the "improvement" will only be 10%.

how IEPs can and should be written with measurable goals that anyone, even parents, can understand and apply. No rational factfinder could compare these two documents based on the evidence presented at trial and conclude that plaintiff's IEPs were adequate.

Plaintiff asks this court to assess her IEPs as a legal matter. Such an analysis is misplaced. First, despite the legal baseline required for IEPs, an individual school district may impose more stringent guidelines and review of IEPs than the federal requirements, as in Exhibit 624. Second, the legal sufficiency of the IEPs is not relevant to the claim for retaliation, and this court is not required to determine the sufficiency as a legal matter. The only issue in this case is whether plaintiff's IEPs failed to meet the District's standards and guidelines and therefore provided a legitimate reason for the nonrenewal of plaintiff's contract.

Although plaintiff presented no evidence at trial related to the legal requirements of an IEP, she now points to the standard established by *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F3d 692, 701 (10th Cir 1998) (citations omitted), that "[t]echnical deviations from the requirements of section 1401(a)(2) . . . do not render an IEP entirely invalid; to hold otherwise would exalt form over substance." Notwithstanding this standard, plaintiff's IEPs were deficient. *O'Toole* echoes the standards of the District that IEPs are "'a way for the child's teacher(s) and parents to be able to track the child's progress in special education'" and requires that instructional goals be "'measurable, intermediate steps between the present levels of educational performance'" and annual goals "'serve as milestones for measuring progress toward meeting the goals.'" *Id* at 703, quoting 34 CFR § 300 App

C, questions 37 & 39. Based on the uncontradicted evidence discussed above, plaintiff's IEPs do not meet this standard.

Nor may plaintiff rely on Exhibit 62, the IEP for student "D.K." in which Whitson substituted a page to replace what plaintiff had drafted in Exhibit 612. Whitson's unrebutted testimony explained that the lack of measurable goals in the page he substituted was directly attributed to the deficiencies in the IEP written by plaintiff for that same student. Whitson could not make the information more measurable because plaintiff had failed to provide the necessary information. Even if Whitson's testimony is disregarded, the record is devoid of anything to assist plaintiff with respect to this particular IEP.

At the close of plaintiff's evidence when the District first moved for judgment as a matter of law on this claim, this court expressed concern that plaintiff had failed to prove that but for her protected activities, the District would have renewed her contract even if her IEPs were inadequate. Instead, the evidence revealed that her inadequate IEPs were a legitimate basis for not renewing her contract, regardless of any retaliatory motives of Winthrop and Credo. As a result, this court warned that it would likely grant a motion for judgment notwithstanding the verdict. Despite this warning, plaintiff did not offer any additional evidence by way of cross-examination or rebuttal testimony to counter this court's concern. Instead, she simply attacked Winthrop's credibility to prove that she had a retaliatory motive. Even assuming that Winthrop was generally motivated by a desire for retaliation, plaintiff still bore the burden to prove that Winthrop's criticism of her IEPs was unjustified and merely a pretext for getting rid of plaintiff because of her protected activities.

The evidence on that point is lacking and certainly not "specific" and "substantial" as required to prove pretext. *Godwin v. Hunt Wesson, Inc.*, 150 F3d 1217, 1222 (9th Cir 1998).

After reviewing all of the evidence, this court concludes that the record conclusively reveals a legitimate, nondiscriminatory reason for the District's decision not to renew her contract, namely plaintiff's inability to write adequate IEPs. Plaintiff presented no evidence to counter the District's evidence of this deficiency. This deficiency was one of the three stated reasons sufficient in and of itself to cause her nonrenewal, even if the District was also motivated by her protected activities not to renew her contract. By prevailing on these facts, plaintiff would be placed in a better position for engaging in protected activities than she would be otherwise. That is not the purpose of the Rehabilitation Act.

Although the jury reached a contrary conclusion, this court is persuaded that the verdict is not supported by any evidence or by any reasonable inferences drawn in plaintiff's favor from the evidence and likely was improperly influenced by the conduct of plaintiff's counsel, as discussed below. Viewing the evidence, together with all reasonable inferences in favor of the verdict, a reasonable person could come to only one conclusion, namely that the District is entitled to a judgment as a matter of law on Claim One for violation of the Rehabilitation Act.

2. Inability to Teach to Students as a Group

The District also argues that plaintiff failed to rebut the evidence that her inability to teach students as a group fully justified the decision to not renew her probationary

contract. Both Winthrop and Matarazzo testified, without contradiction, that in addition to her inadequate IEs, plaintiff's inability to teach to students as a group was an independently sufficient reason to not renew the contract.

The exhibits contain Winthrop's observations that plaintiff repeatedly had difficulty engaging and teaching to students as a group and enabling the EAs to work with her to ensure that the students were sufficiently engaged. *See* Exhibits 508, 515, 517, 518, 519, 522, 523, 525. These observations about deficiencies in teaching to a group began in October 1998 and continued through 2000.[2] On cross-examination of Winthrop, plaintiff's counsel asked no questions about these observations.

Although acknowledging that plaintiff did produce some evidence to contradict Winthrop's assertions, the District contends that it must be disregarded. Plaintiff's witness, Betty Zambrano (a special education teacher from Marshall High School), testified that she was present in a classroom and observed that plaintiff was teaching well. Excerpt 14, Testimony of Betty Zambrano, pp. 12-13. However, defendants correctly point out that the student-to-adult ratio was close to one-to-one. Similarly, Linda

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[2] The decision of the arbitrator does not preclude consideration of Winthrop's observation notes. As an initial matter, this limited part of the arbitrator's decision related to the December 1999 evaluation and the jottings that were revised into Winthrop's formal observation notes. The trial exhibits, however, included observations and evaluations not just from the period of time related to the 1999 evaluation, but throughout the two years of plaintiff's employment. *See* Exhibits 508-513, 521-523, 525. Moreover, the arbitrator found that the December 1999 evaluation, which concluded that plaintiffs teaching abilities were lacking, was made in good faith and was not retaliatory. Furthermore, Exhibit 525, the final evaluation of plaintiff, was not involved in the arbitration.

Owens (Vice Principal of Wilson High School) testified that at Winthrop's request, she evaluated plaintiff. However, as defendants again correctly note, the class she evaluated had a one-to-one student-adult ratio. Excerpt 15, Testimony of Linda Owens, p. 21. Thus, those ratios do not show that plaintiff was proficient in teaching to a group.

One witness did contradict Winthrop. Winthrop testified that she was hit in the head with a tennis ball during a group lesson at Applegate School taught by plaintiff Elsie Weden, an EA ("Weden"), was present during that same class and testified that plaintiff had no problem teaching the group tennis lesson at Applegate School. The District discounts Weden's opinion pointing out that she was not trained to teach APE or to observe an APE class. In addition, plaintiff herself admits that she did not even notice that Winthrop had been hit with a tennis ball, indicating that she was at least somewhat deficient in monitoring the class.

If this were the sum total of the evidence, the District would have a strong argument that plaintiff's evidence was wholly insufficient to support the verdict. However, Winthrop did observe plaintiff teaching a self-defense class to group of students at Franklin High School in March 1999, which she described as an "excellent session." Exhibit 23. This contradicts her conclusion that plaintiff had trouble teaching groups of students, at least in plaintiff's first year. Thus, unlike her conclusions concerning the IEPs, Winthrop's conclusions from her own observations of plaintiff's ability to teach a group of students conflict.

This conflicting evidence allows the reasonable inference that Winthrop's criticisms of plaintiff's teaching

ability as a group may have been inaccurate and retaliatory. One isolated example of competent teaching is certainly a thin reed to question the overall conclusions Winthrop made based on her observations of plaintiff over a period of two years. However, the jury was entitled to disbelieve Winthrop and believe plaintiff and Weden on this issue. As a result, the District is not entitled to judgment as a matter of law *against* Claim One on this ground.

III. Motion for Judgment as Matter of Law on Claim Two (Motion 2)

Pursuant to FRCP 50(b), defendants move this court for the entry of judgment as a matter of law in their favor on Claim Two alleging retaliation in violation of civil rights under § 1983. Winthrop and Crebo argue that they are entitled to qualified immunity, and the District argues that plaintiff has not proven ratification or a pattern and practice of retaliation by the District. In addition, all defendants argue that plaintiff has not proven that the reasons to not renew her contract (deficient IEPs and inability to teach to a group) were pretextual. As discussed below, the motion is granted.

A. Qualified Immunity

When government officials are sued in their individual capacity, they are entitled to qualified immunity. *Harlow v. Fitzgerald,* 457 US 800 (1982). A plaintiff can overcome qualified immunity only if a defendant's conduct violates a clearly established right of the plaintiff of which a reasonable person would have known. *Brewster v. Board of Educ. of Lynwood Unified Sch. Dist.,* 149 F3d 971, 977 (9th Cir 1998), *cert denied*, 526 US 1018 (1999). "As the

qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 US 335, 341 (1986). To provide that ample protection, the employer's justification for the discipline must be taken into account in determining whether the defendants' conduct was objectively unreasonable, that is, whether "no reasonably competent officer would have concluded" that the discipline could be imposed without violating the employee's First Amendment rights. *Id.*

If a public employee's speech involves a matter of public concern, then the state employer's interest in promoting workplace efficiency must outweigh the plaintiff's First Amendment rights to avoid liability. *Pickering v. Board of Ed. of Township High Sch. Dist. 205*, 391 US 563, 568 (1988). "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers*, 461 US 138, 151-52 (1983). However, the government's burden in justifying a termination depends on the nature of the employee's expression: the greater the protection afforded the whistleblower's speech, the greater the showing of disruption must be. *Id* at 150. "[T]he determination whether an employee's expression is constitutionally protected requires a fact-sensitive, context-specific balancing of competing interests, [so] the law regarding public-employee free speech claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under Harlow and its progeny." *Brewster* 149 F3d at 979-80 (internal quotations omitted), quoting *Moran v. State of Wash.*, 147 F3d 839, 847 (9th Cir 1998).

Winthrop and Crebo first argue that the *Pickering* balancing inquiry need not be applied in this case because

the content of plaintiff's speech was not the reason for the District's nonrenewal decision. Unlike the "but for" test derived from Title VII for the Rehabilitation Act retaliation claim discussed above, § 1983 requires only that a plaintiff prove that her speech was a "substantial or motivating factor" for the adverse employment action. *Board of County Comm'rs v. Umbehr*, 518 US 668, 675 (1996). Plaintiff presented substantial evidence that the content of her speech reporting violations of the law by the District was a factor, although not perhaps the determining factor, for the nonrenewal decision. That is sufficient to bring plaintiff's speech within the ambit of the First Amendment.

Winthrop and Crebo next argue that they are entitled to qualified immunity under the *Pickering* balancing test between free speech and workplace disruption. This court must determine "whether the specific facts of this case present one of those rare instances in which *Pickering* rights are, despite balancing, clearly established." *Brewster*, 149 F3d at 980. Because some anger or unhappiness necessarily accompanies speech on issues of public concern, the employer "must do more than show mere disruption," and instead "must show actual injury to its legitimate interests." *Johnson v. Multnomah County*, 48 F3d 420, 427 (9th Cir), *cert denied,* 515 US 1161 (1995). Noting that "'[w]histle blowing,' by its very nature . . . engender(s) some hostility and resistance," the Ninth Circuit has explained that:

> For us to find that the government's interest as an employer in a smoothly-running office outweighs Roth's first amendment right, defendants must demonstrate actual, material and substantial disruption. . . . In evaluating any alleged disruption,

> we must "focus[] on the effective functioning of the public employer's enterprise." . . . We also recognize that the state may have a strong interest in avoiding disruption of "work, personnel relationships, or the speaker's job performance. . . ."

Roth v. Veteran's Admin. of Gov't of United States, 856 F2d 1401, 1407 (9th Cir 1988) (citations omitted).

An employer "cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure." *Johnson*, 48 F3d at 427. In *Johnson*, the County's showing of disruption was evidence that the plaintiff's statements interfered with her close working relationship with her boss and undermined her boss' relationship with his coworkers, subordinates and private vendors. The Ninth Circuit found this evidence insufficient to entitle the County to summary judgment on the ground that its legitimate administrative interests outweighed the plaintiff's First Amendment interest. The County's interests were not injured if the boss "was undermined by truthful statements exposing his own wrongdoing." *Id.*

The most recent Ninth Circuit case addressing the qualified immunity defense to a claim of retaliation for exercising free speech rights is *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F3d 741 (9th Cir 2001). In *Keyser*, the Ninth Circuit affirmed summary judgment granting qualified immunity to plaintiffs' supervisor because it was not clearly established that it was illegal to retaliate against plaintiffs for bringing charges of misuse of public funds to light. The court first discussed a series of Ninth Circuit cases "establishing that the public's interest in learning about illegal conduct by public officials and other matters at the core of First Amendment protection outweighs

a state employer's interest in avoiding a mere *potential* disturbance in the workplace." *Id* at 748 (emphasis in original). It then concluded that the facts in *Keyser* fell "precisely" within this precedent because there was "'no evidence of actual disruption,' caused by [plaintiffs'] speech, let alone any evidence of 'actual injury to . . . legitimate interests' beyond the 'disruption that necessarily accompanies' such speech." *Id* at 749 (citations omitted).

> Sweeney only argues in speculation that [plaintiffs] speech must have significantly disrupted the provision of education services by the District. He does not cite to a single page in the record where either he or a Board member describes any disruption. Indeed, he cannot claim that [plaintiffs'] speech disrupted his relationship with them because he denies even knowing that they made the accusations of his misuse of public funds until this lawsuit was filed.

Id.

Keyser distinguished *Brewster* (also authored by Judge O'Scannlain) which reversed a denial of summary judgment to a government employer on qualified immunity grounds. "In *Brewster*, we decided that qualified immunity was warranted because the particular balance of free speech and workplace disruption in that case was both unprecedented and too close to call to say it was clearly established." *Id.* There was "testimony in the record where other employees stated that Brewsters' allegations of falsified attendance records had caused disruption at the workplace" and "'Brewster's allegations of erroneous record keeping were ultimately determined to be false,' which 'weigh[ed] against [his] claim.'" *Id* (citations omitted).

Whether the speech is directed internally, as opposed to the public or the media, is not determinative. *Id* at 724 n3. *Keyser* also declined to apply the high-level policymaking exception because plaintiffs' speech had nothing to do with "'legislative or administrative vision,' but instead charged [Sweeney] with illegally using federal money." *Id* at 750.

The issue here is whether the evidence, viewed solely in favor of plaintiff, reveals actual injury to the District's legitimate interests, as in *Brewster,* or a mere potential or insufficient workplace disturbance, as in *Keyser* and *Johnson.* Plaintiff's supervisors, Winthrop and Crebo, both testified that they responded to plaintiff as they did because plaintiff acted in a manner that frustrated their ability to do their own jobs and interfered with the teamwork approach to special education. However, even if their testimony is disregarded under *Reeves,* several of plaintiff's colleagues testified to the devastating effect that plaintiff's letter to Dr. Benjamin Canada, the Superintendent at the time (Exhibit 551), had on the cohesion of the APE teachers. The testimony of Gail Reynolds (who filed a complaint against plaintiff because of the letter), Bonnie Doyle, and Jan Standlea explaining the adverse impact of plaintiff's letter to Canada was unrebutted. After plaintiff's injurious letter, the APE staff was not able to work together and held a difficult meeting that attempted to turn that negative event into a more positive one. Also, high school administrators Opal Chancler-Moore, John Crooks, Linda Owens, and Carla Randall all testified to communication problems with plaintiff that dramatically interfered with their ability to manage their schools. In fact, plaintiff had an antagonistic relationship with staff at every school but one at which she worked and damaged

the relationships between other staff and between other staff and parents.

The evidence in this case is much closer to *Brewster* than to *Keyser* because it goes well beyond the speculation and proves that plaintiff's speech did significantly disrupt the provision of educational services by the District. As in *Brewster,* other employees testified that plaintiff's behavior, as opposed to simply her complaints of violations, engendered disharmony in the schools in which she worked and upset the working relationship between plaintiff and her supervisors, as well as between the school administrators and her colleagues and among her colleagues. Unlike *Brewster*, it is unknown whether plaintiff's complaints were false; instead defendants stipulated that her complaints were made in good faith in order to avoid a lengthy trial on the merits of her complaints. However, the relative merits of the complaints is only one consideration among many in the balancing inquiry.

Admittedly, the undisputed evidence in this case is not nearly as strong as in *Fales v. Garst,* 235 F3d 1122 (8th Cir 2001), which reversed the trial court's denial of summary judgment to the defendant-principal on qualified immunity. Three special education teachers complained about special education programs, which resulted in "school factions and disharmony among their coworkers," as evidenced by several other teachers verbally accosting one of them and "an on-going battle with the fifth-grade teachers concerning special education issues." *Id* at 1124. This "school climate led the district's superintendent to recruit a consultant to mediate the issues," which proved unsuccessful. *Id.* Because "the middle school became polarized, dividing into pro- and anti-[defendant] groups,"

the Eighth Circuit concluded that "it is beyond peradventure that the plaintiffs' speech caused the school upheaval" and that "the teachers' interest in speaking on these matters was outweighed by the interest of efficient administration of the middle school." *Id* at 1124.

Although plaintiffs speech did not require the hiring of a consultant to mediate the problem, as in *Fales*, it did require mediation to resolve Gail Reynolds' complaint and also caused polarization among the APE teachers, as well as upheaval in the schools where she taught The testimony from a number of employees confirms that the style and tenor of plaintiff's speech, more than the substance, significantly disrupted efficient administration by the District. The District had to investigate and resolve several complaints from parents, as well as staff, arising from plaintiff's method of dissenting. For example, Gabby Frieder testified that plaintiff incited trouble at Wilson High School. This is evidence of actual, not potential, workplace disruption as in *Brewster,* is more than a minimal disruption as in *Johnson,* and thus is sufficient under the teachings of the Ninth Circuit to warrant qualified immunity.

This is simply not one of the rare occasions in which an employee's free speech claim is sufficiently "clearly established" to preclude qualified immunity. As explained in *Brewster*:

> In view of the competing considerations on each side of the *Pickering* balance and the absence of specific direction from the relevant case law, it would, we think, be dubious indeed to conclude that Brewster's right to speak was sufficiently "clearly established" to defeat the school officials' assertion of qualifed immunity.

Brewster, 149 F3d at 981.

Accordingly, Winthrop and Crebo's motion for judgment as matter of law based on qualified immunity is granted.

B. Sufficiency of Proof of Ratification or Pattern and Practice

The District claims that plaintiff has not sufficiently proven ratification or a pattern and practice to establish liability under § 1983. This court agrees.

A governmental entity cannot be held vicariously liable for the unconstitutional acts of its employees based upon a *respondent superior* theory. *Monell v. Departmen of Soc. Servs. of the City of New York*, 436 US 658, 691 (1978). Instead, to impose § 1983 liability against a governmental entity, a plaintiff must rely on one of three theories:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy. . . . Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.

Trevino v. Gates, 99 F3d 911, 918 (9th Cir 1996), *cert denied*, 520 US 1117 (1997), *citing Gillette v. Delmore*, 979

F2d 1342, 1346-47 (9th Cir 1992), *cert denied,* 510 US 932 (1993).

If relying on the first theory, a plaintiff must "demonstrate the existence of an official policy or widespread custom of illegal and injurious discrimination." *Bryan County Comm'rs v. Brown,* 520 US 397, 403 (1997). The practices of the government officials must be "so permanent and well-settled as to constitute a 'custom or usage' with the force of law." *Monell,* 436 US at 690-91. Proof of random acts or isolated events are insufficient to establish a custom. *Thompson v. City of Los Angeles,* 885 F2d 1439, 1444 (9th Cir 1989). Governmental entities cannot be liable without more than one incidence of a constitutional violation of a non-policy maker. *Davis v. City of Ellensburg,* 869 F2d 1230, 1234 (9th Cir 1989).

Plaintiff presented no evidence at all in this case of an official policy or widespread custom. Instead, she relies solely on a single instance of alleged misconduct which does not lead to liability under § 1983 unless ratified by the authorized policymaker for the entity. Ratification does not occur unless the authorized policymaker "approve[s] a subordinate's decision and the basis for it." *City of St. Louis v. Praprotnik,* 485 US 112, 127 (1988) (reversing the Eighth Circuit's affirmance of the trial court in a retaliation case because the supervisor's decision was not individually reviewed by the appropriate policymaker). State law determines who may ratify an allegedly illegal decision. *Id* at 124. Under Oregon law, Oregon school boards have the authority to make renewal decisions with respect to probationary teachers. ORS 342.835. Therefore, to prove ratification, plaintiff had to prove not only that the District's Board approved of her nonrenewal, but also that it

approved it on a retaliatory basis. *Praprotnik,* 485 US at 124.

Despite plaintiff's argument to the contrary, it is not sufficient that Dr. Canada ratified the nonrenewal decision unless he was the appropriate policymaker. As the District's Superintendent, he certainly did not have the final authority under Oregon law to approve the nonrenewal, and plaintiff presented no evidence that the District's Board delegated its statutory authority to him. Nor did plaintiff present any evidence that any information was presented to the District's Board relating to any of the complaints she made related to special education. Thus, plaintiff's theory based on ratification suffers from a failure of proof and fails as a matter of law. Accordingly, the District's motion for judgment as a matter of law on Claim Two is granted.

C. Sufficiency of Proof of Pretext

As discussed above, this court has concluded that both Winthrop and Crebo are entitled to qualified immunity and that plaintiff failed to prove either ratification or a pattern or practice by the District sufficient to establish liability under § 1983. However, the § 1983 claim fails for another reason as well.

For the same reasons as discussed under Claim One, plaintiff has not proven that one of the reasons for the nonrenewal of her contract was pretextual. When a government employee alleges that she has been punished in retaliation for exercising First Amendment rights, courts must engage in a three-part inquiry:

> To prevail, an employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the [punishment]. If the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct.

Keyser, 265 F3d at 750, citing *Umbehr*, 518 US at 675.

By this standard, the absence of defendants' liability is clear. As discussed above, even if plaintiff had not complained of matters related to the treatment of special education students, the District proved, without any contrary evidence by plaintiff, that her inability to write IEPs was sufficient for it to deny renewal of her probationary contract. Thus, the District would have taken the same action even in the absence of her protected speech.

IV. Motion for Judgment as a Matter of Law on Claim Four (Motion 3)

Pursuant to FRCP 50(b), the District moves this court for the entry of judgment as a matter of law in its favor on Claim Four alleging a violation of the Whistleblower Act under ORS 659.530 because plaintiff made no disclosure and has not proven pretext. Although this court concludes that plaintiff did make protected disclosures, she failed to prove pretext.

A. Disclosure

Here plaintiff complained internally to her supervisors, Winthrop, Crebo and Dr. Canada, and also to her union. Because she did not complain to some outside

agency, the District argues that this is not a "disclosure" protected by the Whistleblower Act.

Pertinent sections of the Whistleblower Act provide that no public employee shall:

> (b) Prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the *disclosure of any information* that the employee reasonably believes is evidence of:
>
> > (A) A violation of any federal or state law, rule or regulation by the state, agency or political subdivision;
> >
> > (B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision.
> >
> > * * *
>
> (d) Discourage, restrain, dissuade, coerce, prevent or otherwise interfere with disclosure or discussions described in this section.

ORS 659.510(1) (emphasis added).

Defendants assert that when read in context, the term "disclosure" means disclosure to an agency that could take some action. For example, ORS 659.510(1)(a) makes it an unlawful employment practice for employers to prohibit employees from having discussions "in response to an official request" with legislators regarding activities of the public body. This section suggests that disclosure is external to an agency or an entity that can take some action in response. In this case, "disclosure" within the meaning of

the statute could have been to the Oregon Department of Education or the United States Department of Education, both of which oversee special education programs in Oregon's schools.

No Oregon cases brought under ORS 659.510(1)(b) have defined "disclosure." In most cases, disclosure has been to an external regulatory agency that could take some action in response. *See, eg, Butler v. Department of Corrections,* 138 Or App 190, 193, 909 P2d 163, 166 (1995) (disclosure to the Accident Prevention Division). However, in at least one case, the disclosure was undefined public criticism and an internal debate with supervisors in an attempt to force compliance with the law. *Demaray v. State of Oregon, Dept. of Envtl. Quality*, 127 Or App 494, 873 P2d 403, *review denied,* 319 Or 625, 879 P2d 1287 (1994).

Because Oregon's Whistleblower Act is very similar to the federal Whistleblower Protection Act of 1989 ("WPA"),[3] decisions by federal courts of the WPA are helpful in defining the sufficiency of a disclosure. Recently addressing this precise issue, the Federal Circuit concluded that reports of wrongdoing to supervisors are protected if made to a person in a supervisory position:

> Any government employee, in a supervisory position, other than the wrongdoer himself, is in a position to "correct" or "remedy" the abuse by bringing the matter to the attention of a higher

[3] The WPA prohibits a personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences – (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 USC § 2302(b)(8)(A).

> authority. To be consistent with the statute and its purposes, complaints to supervisors concerning wrongdoing by other employees or other matters within the scope of the WPA should be encouraged and not discouraged, even if the supervisor himself lacks authority to directly correct the wrongdoing.

Huffman v. Office of Personnel Mgmt., 263 F3d 1341, 1351 (Fed Cir 2001).

This analysis is consistent with the broad remedial purposes of ORS 659.510. The Oregon Whistleblower Act seeks to create a workplace environment free from fear of retaliation. That intent would be thwarted by allowing someone in an employee's workplace to retaliate before the employee complained to someone outside the workplace. Contrary to defendants' contention, protecting disclosures to supervisors does not extend Oregon's Whistleblower Act to an undefined limit. A complaint to a supervisor must be more than the general griping that is typical in a workplace; it must be made in good faith and fall within one of the specific types of protected complaints, such as a disclosure of evidence of a violation of federal law, as in this case.

Therefore, defendants' motion for judgment as a matter of law against Claim Four is denied on this basis.

B. Sufficiency of Proof of Pretext

Even if plaintiff made an actionable disclosure, defendants argue that her claim fails as a matter of law because she has not sufficiently proven that she was terminated because of her disclosure.

Because no Oregon case provides any guidance, this court applies the Title VII retaliation frame work to determine liability for retaliation under the Oregon Whistle blower Act. *See Ryan v. Patterson Dental Supply, Inc.*, 2000 WL 640859, *13 (D Or May 12, 2000). In order to state a *prima facie* case of retaliation under Title VII, a plaintiff must establish: "(1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision." *Trent v. Valley Elec. Assn, Inc.*, 41 F3d 524, 526 (9th Cir 1994), citing *EEOC v. Hacienda Hotel*, 881 F2d 1504, 1513-14 (9th Cir 1989). If the plaintiff makes out a prima facie case of retaliation, the burden then shifts to the defendant to articulate some legitimate, non-retaliatory reason for the adverse action. If the defendant does so, then the plaintiff must prove that the employer's reason is mere pretext and that the decision was made in retaliation for the protected activity. *Id.*

In *Hardie v. Legacy Health Sys.*, 167 Or App 425, 435, 6 P3d 531, 538 (2000), *review denied*, 332 Or 656, 36 P2d 973 (2001), the Oregon Court of Appeals clarified the causation analysis under Oregon law: "The crux of the standard, regardless of which phraseology is attached to it, is whether, in the absence of the discriminatory motive, the employee would have been treated differently."

> *In Price Waterhouse v. Hopkins*, [490 US 228, 240 (1989)], the United States Supreme Court explained: "But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event

> nevertheless would have transpired in the same way." If an event would have transpired in the same way, a factor is not a "but for" cause.

Id, 167 Or App at 435 n6, 6 P3d at 537 n6.

This causation element is the third step of a *prima facie* case that is the plaintiff's burden. *Id,* 167 Or App at 433, 6 P3d at 536. As a result, plaintiff had the burden to show that she would have been renewed in the absence of the District's allegedly unlawful discriminatory motive. *Id,* 167 Or App at 435, 6 P3d at 537.

As explained above, plaintiff has not sustained her burden to show causation. Because she did not rebut testimony related to her inability to write IEPs, she did not sufficiently show that but for her complaints about the mistreatment of special education students, her contract would have been renewed. Therefore, defendants' motion for judgment as a matter of law on Claim Four is granted for failure to prove causation.

V. Motion for Judgment as a Matter of Law on Punitive Damages (Motion 4)

Pursuant to FRCP 50(b), defendants Winthrop and Crebo separately move the court for judgment in their favor with respect to the punitive damages awarded by the jury on the § 1983 claim. Although this motion is denied as moot based on the disposition of Motion 2, defendants move in the alternative for a new trial on this basis (Motion 8). If defendants were not entitled to judgment as a matter of law or a new trial on the § 1983 claim, and the jury verdict were not set aside on the § 1983 claim, then this court would not grant judgment as a matter of law or a new trial solely on its award of punitive damages.

As the jury was instructed, punitive damages are not appropriate unless the defendants engaged in wanton conduct defined as a particular aggravated, deliberate, or reckless disregard of the rights of others. If Winthrop and Crebo retaliated against plaintiff because of her protected speech, they certainly did so deliberately. Whether their conduct was sufficiently aggravated to rise to the level of punitive damages is for a jury to decide.

VI. Motion for Judgment as a Matter of Law on Noneconomic Damages (Motion 5)

Pursuant to FRCP 50(b), defendants move the court for judgment as a matter of law on the issue of noneconomic damages. Although the court's rulings on Motions 1-3 render this motion moot, defendants move in the alternative for a new trial on this basis (Motion 8). If defendants were not entitled to judgment as a matter of law or a new trial on all claims, and the jury verdict were not set aside on all claims, then this court would not grant judgment as a matter of law or a new trial solely on its award of economic damages.

Although the parties agree that the court properly instructed the jury as to the law on noneconomic damages, defendants argue that the evidence did not support an award of any noneconomic damages. According to defendants, the sole basis for noneconomic damages were plaintiff's symptoms caused by Graves' Disease affecting her thyroid, which this court withdrew from the jury's consideration. Defendants contend that plaintiff presented no other specific evidence related to any pain and suffering.

However, defendants' argument overlooks plaintiff's testimony that she suffered stress caused by Winthrop before she began suffering any symptoms later diagnosed as Graves' Disease. Excerpt 11A, p. 4. Although she sought unsuccessfully to prove that her Graves' Disease was caused by stress, she did testify at several points that she suffered from stress caused by Winthrop, specifically with regard to the increased surveillance and request to stop writing letters. This testimony provides at least some factual basis for an award of emotional pain and suffering.

This court questions how the jury could have awarded plaintiff the maximum amount she sought of $500,000.00 based only on her minimal testimony without any corroborating evidence, even from her husband who was present throughout the trial, or without any medical or psychiatric treatment. If this court were writing on a clean slate, it would follow *Hetzel v. County of Prince William,* 89 F3d 169, 171 (4th Cir), *cert denied,* 519 US 1028 (1996), in which the Fourth Circuit ruled against an award of substantial compensatory damages in a similar case. In *Hetzel,* the plaintiff offered no corroborating evidence for her emotional damages and sought no counseling from anyone.

However, the Ninth Circuit specifically rejected *Hetzel* in *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F3d 493 (9th Cir 2000). *In Passantino,* the Ninth Circuit upheld a jury award of $1 million in compensatory emotional distress damages based on the plaintiff's testimony, corroborated by her husband and sister, that she experienced substantial anxiety as a result of her sense that she could no longer be promoted due to defendant's retaliation against her. Contrary to some other circuits, the Ninth Circuit rejected the suggestion that

emotional damage awards must be supported by some objective evidence and expressly rejected *Hetzel,* explaining that "the Fourth Circuit's holding does not bind us, even when we are applying federal law, let alone when it is Washington law that guides us." *Id* at 514.

Due to plaintiff's testimony, albeit minimal, that Winthrop caused her to suffer stress, this court is foreclosed by *Passantino* from granting defendants' motion for judgment as a matter of law against the award of noneconomic damages, even if any of plaintiff's claims survived defendants' motions for judgment as a matter of law.

VII. Motions for Judgment as a Matter of Law and New Trial based on Misconduct of Plaintiffs Counsel (Motions 6 and 7)

Because of the misconduct of plaintiffs counsel throughout the trial, and in particular in his closing rebuttal argument, defendants move for judgment as a matter of law in their favor on all claims (Motions 6 and 7). This court's prior rulings on Motions 1-3 render these motions moot. However, defendants also move, in the alternative, for a new trial on this basis (Motion 8) and, as noted above, this court is persuaded that the jury's verdict was contrary to the evidence due largely to the improper influence of plaintiff's counsel. Therefore, this court will address the merits of these motions.

A. Exclusion of Program Testimony

On no less than four separate occasions this court excluded testimony about whether or not the District's special education programs violated the law. First, it did so at the pleading stage. Findings and Recommendation,

dated May 12, 2000 (docket #20). Second, at the discovery stage, the court confirmed during Crebo's deposition that there would be no evidence on whether the District had or had not violated the law. Rather, the only permissible evidence was whether plaintiff had been retaliated against for making "good faith" complaints. Crebo Depo, pp. 46-59. Third, this court granted defendants' motion *in limine* #1 to exclude "program" testimony, meaning testimony as to whether the District's special education programs violated the law (docket #123). Fourth, upon receiving plaintiff's witness statements, this court granted defendants' motion to strike all of the proposed testimony of parents, teachers, and former teachers about District programs and whether they violated the law (docket # 124).

This court could not have been more clear that the merits of the District's special education program were not at issue in this action. Despite these rulings, both in closing argument and throughout the trial, plaintiff's counsel, Greg Kafoury ("Kafoury"), repeatedly asked questions and made statements designed to convert sympathy for students with disabilities whose rights had been violated by the District into a verdict for plaintiff, reaching a crescendo in his final rebuttal argument. To this end, he succeeded.

During plaintiff's case, some testimony was remarkable for its plain violation of the court's pretrial rulings. For example, Kafoury announced that he planned to call Judy Backer, mother of a student at Marshall High School ("Backer"), as a rebuttal witness. Defendants moved to exclude her testimony based on this court's pre-trial ruling on the motion *in limine* that testimony about program issues was inadmissible. The court again ruled that such testimony was prohibited, but Kafoury assured the court

that Backer would testify only that it was she, and not Winthrop, who secured the ramp for use with the Marshall High School tennis courts. Excerpt 23, p. 6. The court agreed to allow this limited testimony.

Kafoury's direct examination of Backer ignored both the court's specific ruling as to Backer and its general rulings excluding program testimony. Backer began her testimony by pointing out that her daughter was a "spastic paraplegic" and continued with an endearing explanation of her brave attempt to learn tennis. She described how her daughter received a tennis racket for Christmas and would boast about how, despite her severe handicaps, she would proudly proclaim "I am a tennis player," as she rolled on her wheelchair through the school hallways with the tennis racket perched in the back of her wheelchair for all to see. Backer, in fact, did not know how the ramp was secured. She knew only that Winthrop "had been working for some time to try to get the ramp," that "nothing had occurred," and that the ramp arrived about a week after she spoke to Mr. Wallick. *Id* at 13-14. She did not know "if it was he who obtained the ramp or perhaps somebody else." *Id* at 14. In short, Backer's testimony about the ramp was nothing more than rank speculation.

Kafoury elicited this testimony to inflame the jury to render a verdict for plaintiff by inducing sympathy for a student with a disability and plaintiff who taught her tennis. After trial, one of plaintiff's other attorneys (who also is her husband) publicly described Backer's testimony as follows:

> The parent of the armless tennis player and her former school principal (now retired) testified about the disparate treatment received by children with disabilities. According to Mr. Goode, as

> the tennis story unfolded, "there was not a dry eye in the gallery."

http://www.wrightslaw.com/info/retaliate.settlegoode.htm (attached to Rawlinson Dec).

Kafoury then referred to Backer's testimony in his closing rebuttal argument by stating that: "This mother of a quadriplegic says, you know, they never help you. You can ask. Nothing ever happens. Doesn't know what goes on behind the walls inside. And she said, well, you know, people fear retaliation. Our kids are pretty vulnerable, and we worry about it." Final Closing of Kafoury, p. 18 (docket #151) ("Rebuttal Closing").

Plaintiff now justifies Backer's testimony as rebutting defendants' witnesses who testified that they never saw any retaliation on the part of the District. This explanation is rejected. First, this is not the reason proffered to the court by Kafoury to allow her testimony. Second, even if it were, this court would not have allowed that testimony. The issue was retaliation by the District against plaintiff, one of its employees, for complaining about the District's purported violations of the law. Backer is a parent, not an employee of the District or one of plaintiffs colleagues, and had no relevant testimony on that issue.

Backer's description of her daughter's love of tennis also tied directly into another student with disabilities ("T. B.") who was not allowed to play tennis and whose photograph Kafoury prominently incorporated into his closing argument. Excerpt 18, First Closing of Kafoury, pp. 12-13 (docket #176) ("First Closing"). Again emphasizing the theme that the jury should render a verdict out of sympathy for students with disabilities, Kafoury said the following regarding T.B.: "They [referring to Winthrop] took

away the tennis program. Broke the heart of this brave little girl suffering from the most cruel of disabilities, Did it just – just out of spite toward my client." Rebuttal Closing at 40. According to plaintiff, this comment simply explains how strongly motivated Winthrop was to get rid of plaintiff. However, it is difficult to discern how discontinuing a tennis program constitutes retaliation against plaintiff. Plaintiff believed it was retaliatory against her only because she believed that her students would suffer as a result. Whether or not her students suffered as a result has everything to do with the forbidden issue of the District mistreating students with disabilities and nothing to do with retaliation by Winthrop against plaintiff for making complaints.

Kafoury made several other statements in his rebuttal closing argument that violated previous court orders, appealed improperly to bias and sympathy, or intentionally misrepresented the evidence. In one of several statements aimed at obtaining a jury verdict based on impermissible considerations of whether the District provided adequate programs to children with disabilities, he said, referring to the phrase "back of the bus" used by plaintiff: "It is a rather obvious and accurate reference to one of the core issues of the civil rights movement, now, isn't it? I mean, don't these kids get the least and the last and the leftovers?" *Id* at 9-10. He also said: "Now, the weight room was filled with grossly inadequate stuff. Dr. Settlegoode testified to it. The weights start at ten pounds. You have a lot of kids that can't lift ten pounds. You've got equipment that's deteriorated or broken." *Id* at 10.

Regarding Opal Chancler-Moore, the principal at Franklin High School ("Chancler-Moore"), Kafoury made another appeal to sympathy based on allegedly inadequate

District programs: "But shouldn't that have made her school a model school for disabled kids? I mean, if there's one principal that ought to be doing just a tremendous job, wouldn't you think it would be her?" *Id* at 11-12.

Again using inappropriate argument regarding the adequacy of District programs at Franklin High School and seeking to elicit a verdict based on sympathy for special-needs children, plaintiff's counsel continued:

> And, of course, you can't use the weights anymore because, well, now we can't have it anymore; we're bumped by the football team, an extracurricular activity, not a core teaching activity, and extracurricular activity bumping a regular class. And this is Chancler-Moore at Franklin.

Id at 13.

> People like football, and – and it makes the administration look good in the community. It helps the principal get support in the community to give the football players what they want.
>
> And the dance team, well, you know, here you've got these tremendously able-bodied people, and they're all beautiful. They look great, you know. They're 15, 16 years old, and they can jump, and twirl, and dance, and do all kinds of cute, fun, stuff; and they get out there at halftime at the basketball games, and everybody loves them. Oh, that's our dance team.
>
> And that's the kind of school, that's the kind of school we've got. We've got a great dance team. Nobody ever says, okay, it's halftime; we're going to have the handicapped kids come out and whack around the tennis ball in their – in their wheelchairs. You don't see that. It doesn't gain

> any points. I mean, it's just the way the world works. It's true.
>
> So they're bumped by the football team, they're bumped by the dance team, two extracurriculars. And they finally get a place that is going to require moving a Pepsi machine.

Id at 14.

Given Chancler-Moore's damaging testimony to plaintiff, it is not surprising that during closing arguments, Kafoury concentrated on program issues primarily at Franklin High School. Plaintiff argues that the remarks about football, dance and the Pepsi machine show that the allocation of space was indeed political, as she had complained to her supervisors, and also show why [Chancler]-Moore valued dance and football more than APE, had a shallow commitment to students with disabilities, and provide a motive for her to rid herself of the troublesome plaintiff. However, [Chancler]-Moore did not terminate plaintiff; Winthrop and Crebo made that decision. It is Winthrop and Crebo's motives that were at issue. Chancler-Moore's testimony was relevant only to confirm what information she communicated to Winthrop about plaintiff. It was not necessary to delve into the merits of plaintiff's complaints about the treatment of students with disabilities at Franklin High School, except to poison the minds of the jurors against the District.

Kafoury also misrepresented defense counsel's statement in final argument. She said that:

> This case is not about the children, and even if you heard things in this case that bothered you, that you wish Portland Public Schools would do differently, there's nothing that you can do with

> your verdict today that will change those particular cases or things that you thought should have been different.

Plaintiff's Memorandum in Opposition to Defense Motions, p. 37,

That argument was consistent with this court's rulings and the Jury Instructions by emphasizing that the issue was employment retaliation, not whether the District violated the Rehabilitation Act. Yet in his rebuttal closing argument, Kafoury said: "Defense Counsel said this is not about the children. The first thing she said. The second thing she said was, there is nothing you can do. If you don't like what you've heard, we're going to keep doing what we're gonna keep doing, and you can't stop us." Rebuttal Closing, p. 20. Kafoury misrepresented what defense counsel had said and inappropriately implied that unless the jury returned a verdict for plaintiff, the District would continue to violate the Rehabilitation Act. He turned the issue from employment retaliation into the District's mistreatment of students with disabilities.

Similarly, Kafoury improperly extrapolated from the testimony of Doug Skille, a Wilson High School physical education teacher ("Skille"). Based on Skille's interchange with plaintiff related to the use of the weight room, Kafoury told the jury that Skille did not want plaintiff and her students to use the room because "the coach just didn't want his fine, young athletes having to share with all those people who are not so much fun to look at." *Id* at 25. There was no evidence to support this argument; it was merely an attempt to evoke sympathy and rage.

Again, improperly seeking to have the jury base its verdict on sympathy for students with disabilities, Kafoury

said: "Is that the world we're going to live in? Is that kind of protection these kids nobody helps, the kind of protection we're going to give them?" *Id* at 26.

Consistent with seeking to elicit sympathy for the children, he suggested that there was inappropriate physical conduct with respect to student "S.H." at Grant High School. "The Grant High School story. I want to run through it very quickly, just so we have our ducks in a row. It starts with this tickling business. Is it appropriate? Is it not appropriate for a 17-year-old autistic child? That's Mr. Sontag [sic]." *Id* at 37-38.

In addition, in his rebuttal closing argument, Kafoury made the inappropriate "send a message" argument, urging the jury that its verdict should be to teach the District a lesson:

> Counsel said, you know there's nothing you can do. That's really the message they give the teachers, isn't it?
>
> But she's wrong because, you know, the teachers, and let's – you appreciate what's gone on in this case. You have some sense of how much time and money and effort has been spent outside this courtroom to bring this to you.
>
> I mean, this is a small war we're fighting here. And believe me, the teachers are paying a lot of attention to how this turns out.
>
> And some will be empowered, and some will lose some power as a result of what you do. There's going to be ripples going out from here a long ways and for a long time.
>
> And the question is whether you want to use this opportunity not just to do justice in this case,

> which sorely needs some justice, but whether you want to use this opportunity to give some power, some breathing room to those who want to make things better, to those who want to be advocates for kids, or whether you want to strengthen the dead hand of this bureaucracy whose face you've seen.

Id at 40-41,

The obvious target of this argument was the District against whom plaintiff could not and did not assert any claim for punitive damages. Although punitive damages may be allowed to serve as a deterrent effect, in this case the only conduct to be deterred would be retaliation against teachers – not inadequate programs for special education students. Appeals to the jury to act as a conscience of the community are not impermissible unless they are specifically designed to inflame the jury. *See United States v. Kopituk,* 690 F2d 1289, 1342-43 (11th Cir 1982), *cert denied*, 463 US 1209 (1983). Here, by urging the jury to "send a message," Kafoury "cross[ed] the line 'demarcating permissible oratorical flourish from impermissible comment calculated to incite the jury against the accused.'" *United States v. Lester,* 749 F2d 1288, 1301 (Cir1984), quoting *Kopituk,* 690 F2d at 1342-43; *see also Strickland v. Owens-Corning*, 142 F3d 353, 358 (6th Cir 1998); *Westbrook v. General Tire & Rubber Co.,* 754 F2d 1233, 1238, *reh'g denied,* 760 F2d 269 (5th Cir 1985).

Plaintiff correctly notes that defendants made no objections during Kafoury's closing arguments, which would have permitted the court to examine the alleged prejudice and to admonish Kafoury or issue a curative instruction, if warranted. Here, however, an objection would have only highlighted the inappropriate statements

which defendants had no opportunity to cure after Kafoury's rebuttal closing argument. Even a curative instruction to the jury from the court might not have enabled the members of the jury to remove from their memories Kafoury's inappropriate "message." The type of misconduct at issue here was "fundamental error" not requiring an objection. *Bird*, 255 F3d at 1148.

Plaintiff also correctly notes that defendants did not always object to evidence concerning forbidden program issues. However, when an attorney asks a question or makes a statement in front of the jury that violates an order granting a motion *in limine,* it is not a mere question of admissibility of evidence or permissibility of a statement. Referring to excluded matters either directly or indirectly is a violation of a court order. *Sloane v. Jerry Scott Drilling Co., Inc.*, 918 F2d 123, 138 (10th Cir 1990). It is not an obligation of the attorney who is victimized by the violation of the court order to make an objection. That was already done when a ruling granted the motion *in limine.*

Plaintiff also correctly notes that program issues could not be completely avoided during the course of this trial, since the alleged retaliation was caused by plaintiff's complaints concerning program issues, both generally and specifically. Although defendants stipulated that plaintiff complained in good faith, her communication style was one of the purported reasons for her termination. Therefore, plaintiff had to justify her communication style, which required her to testify to some extent as to what she observed in order to explain why and how she complained as she did.

Nevertheless, the issue of plaintiff's communication style did not open the door to plaintiff to show that all of her complaints had merit and to paint herself as the only person in the District who really cared about students with disabilities. This court made it very clear on several occasions to plaintiff that this trial would not be about students with disabilities, but about why plaintiff's contract was not renewed. The testimony elicited in violation of this court's rulings left the jury with the unrebutted impression that the District had in fact violated and would not comply with laws regarding students with disabilities unless the jury rendered a verdict in plaintiff's favor. The District was placed in the untenable situation that this court had sought to avoid with its pretrial rulings because it was unable to prove that it had in fact not violated the laws regarding students with disabilities.

Moreover, plaintiff's counsel used the program issues in his closing arguments in an inflammatory manner. Plaintiff's counsel now tries to justify his attempts to evoke sympathy in the closing argument by explaining that any fact in evidence may be commented upon in argument. To the contrary, when evidence is admitted for a limited purpose, it may not be commented on for a general purpose. *Waldron v. Waldron*, 156 US 361, 381 (1895) ("It is clear that where evidence is admitted for one certain purpose, and that only, the mere fact that its admission was not objected to at the time, does not authorize the use of it for other purposes for which it was and could not have been legally introduced"). As a result, to the limited extent that plaintiff was permitted to describe the conditions that she observed that formed the basis for her complaints to the District, these same conditions could not be used in

closing argument in an attempt to sway the jury to render its verdict on sympathy for children with disabilities.

Eliciting evidence and emphasizing to the jury how the District mistreated students with disabilities violated the court's pre-trial rulings. Placing the District on trial for mistreating students with disabilities was clearly prejudicial to the District.

> Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law.

F. W. Woolworth Co. v. Wilson, 74 F2d 439, 443 (5th Cir 1934); *Klotz v. Sears, Roebuck & Co.,* 267 F2d 53, 55 (7th Cir), *cert denied,* 361 US 877 (1959).

Kafoury's misconduct is particularly troubling since he appears to justify it by arguing that defendants' counsel is guilty of misconduct. Defendants' counsel did begin her closing argument with an inappropriate comment to which this court sustained plaintiff's objection. But one inappropriate comment by defense counsel does not excuse Kafoury's repeated misconduct.

B. Dr. Melvin's Testimony

Dr. Melvin, plaintiff's treating doctor, was called as one of plaintiff's witnesses. After reviewing Dr. Melvin's credentials, Kafoury asked him whether he agreed with the opinion of Dr. Greer, defendants' expert witness, that

the scientific evidence is not sufficiently convincing to prove that stress causes Graves' Disease. Defendants' objection was sustained and the answer ("I agree") was stricken.[4] Melvin Transcript, pp. 6:13-7:9. In an effort to establish some link between Graves' Disease and stress, Kafoury later tried to ask the question again, which this court prevented. *Id* at 8:13-20. As the court later pointed out to Kafoury, that question should never have been asked in the first place.

Again, the court had already explicitly ruled, in granting defendants' motion *in limine* before trial, that Dr. Melvin could testify only to opinions he had reached in his diagnosis and treatment of plaintiff and not as an expert witness. It is improper to refer to excluded matters either directly or indirectly. *Slane,* 918 F2d at 128.

Although this court removed damages allegedly stemming from Graves' Disease from consideration by the jury, the jury awarded plaintiff her full prayer for noneconomic damages. Other than her few vague references to stress caused by Winthrop, plaintiff's only testimony of her symptoms were the symptoms of Graves' Disease. Excerpt 11A, pp. 3-4. This leads to the reasonable inference that the jury was improperly influenced by Kafoury's mere asking of the question. There was no testimony (although Kafoury said otherwise to the jury in his closing argument) to suggest that plaintiff's career in special education had been "crushed" or that her nonrenewal by

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[4] Although Dr. Melvin's answer, which was stricken, seemed to favor defendants, some jurors may not have heard it. In any event, the clear purport of the entirety of Dr. Melvin's testimony was that he believed that plaintiff's Graves' Disease had been brought about by stress.

the District had anything to do with her failure to attain other employment after she taught at Linfield College in the 2000-2001 school year.

C. Chancler-Moore

In both her deposition and the arbitration, plaintiff had praised Chancler-Moore as one of her supporters and described Franklin High School as the one high school where plaintiff believed she had make significant inroads in improving access to facilities. Yet Chancler-Moore testified that plaintiff was a disruptive influence at Franklin High School and that she wanted plaintiff out of Franklin High School. She described plaintiff as a panderer and sycophant and supported these observations through plaintiffs letters. She said that plaintiff suffered from an "alternate view of reality."

On cross-examination, plaintiff's counsel first tried to impeach Chancler-Moore by asking about a "Franklin High Board" that purportedly criticized her performance at Franklin. When the court sustained this objection as collateral, plaintiff's counsel asked essentially identical questions about plaintiff's previous tenure at Jefferson High School, a school well known to the public in the greater Portland area (where all the jurors resided) for academic problems and for the "reconstituting" of its faculty. The court also sustained objection to these questions. Kafoury should have known from the sustained objection about the "Franklin Board" that the questions about Jefferson High School were even more inappropriate. However, when Kafoury called plaintiff as a rebuttal witness, he once again sought to present this inadmissible, collateral testimony, and once again the court ruled that

he could not. These repeated attempts to introduce a collateral issue were highly inappropriate.

D. Accusations about Defendants' Trial Counsel

During his rebuttal closing argument, this court observed Kafoury repeatedly point to and stare at defendants' trial counsel as he suggested that they were actors in the alleged retaliation and had, in effect, given witnesses scripts to continue the alleged cover-up in trial by acting out false testimony. There was some evidence that the District's lawyers were involved at some point in giving advice to District employees concerning plaintiff. Winthrop testified that on advice of counsel, whom she did not identify, she tape-recorded telephone messages from plaintiff, and Dr. Canada testified that when he received plaintiff's November 21, 1999 letter (Exhibit 551), he referred it to both Crebo and legal counsel.[5] Yet based only on this evidence, Kafoury stood before the jury, repeatedly pointed at defendants' trial counsel and accused them of conspiring to get rid of plaintiff and creating false evidence. He stated as follows:

1. Regarding Chancler-Moore:

> She said that this phrase "back of the bus," describing how the kids with disabilities are treated was an attempt to pander to her because of her race.

Uhm, this was prepared testimony. Counsel has a list of questions. He's reading them. She's on

[5] Dr. Canada also testified that Crebo was authorized to seek legal counsel, including outside counsel, if he needed it, but there was no evidence that Crebo did so.

> the stand. Everybody knows, knows what's coming. This is prepared testimony, direct testimony.

Rebuttal Closing, pp. 8-9.

> Now, maybe Opal Chancler-Moore didn't know that this phrase [back of the bus] had been rattling around for a year and appeared in writing in other places when she testified, but, you know, they're – they've got a team effort over here, and they know it, and they chose to take a shot at my client as pandering to this woman on a racial basis, when they knew better. And that's not fair. And that shouldn't have happened

Id at 9.

> 2. Regarding former Assistant Superintendent Carol Matarazzo:
>
> > This suggests that rather having – rather than having deep and thoughtful opinions on any of this stuff she's just got a script which is about that thick, and once she's up there she can't begin to defend this stuff. She's just reading stuff somebody else has written. Boy, does it show?

Id at 35.[6]

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[6] Plaintiff argues that on cross-examination, Matarazzo retreated from every criticism of plaintiff that she had made on direct examination. That is not the way this court heard or understood her testimony. For example, although she testified that it was not inappropriate for plaintiff to call Winthrop incompetent or irresponsible, she explained that such an approach was not the way to try and solve problems.

3. Regarding Dr. Canada:

Remember Ben Canada's testimony? He said that at least by the time he got my client's letter counsel for the District was involved.

Now, read through that. Think about how the world works. What it means is that there was a decision made that she was toast, and now the question is how can we create a paper trail that will withstand scrutiny.

Now, they'd already botched it by having Winthrop continue to evaluate my client and having Winthrop be her own investigator. I mean, how bad does that look?

But now that the lawyers are involved, what do you do? How do you make it look good? Well, there are certain obvious techniques. It's not brain surgery, but it's helpful to have a lawyer here to walk you through it.

Number one, you don't want to create something entirely new. You don't want to say, wait a minute. All of a sudden she's this way or that way, because the question will be, well, why didn't you notice that the first year?

So what you do is you go back to the first year evaluations and try to find something where there was some thread of criticism. You say, okay. That's something we can work with; we've got a paper trail before she writes a letter.

Now, as we start making our new paper trail, we're going to build on that; we're going to strengthen that. We're going to use those same themes, only now we're going to

> heighten them into – into unfitness to teach. Poor girl. She just – she just tried, but she just couldn't hack it; just couldn't look up and look around. Whatever.
>
> Why do you put in some stuff that's favorable? Because you're not trying to look like a fool. You want to put in just enough to do the job. How many "I"s [needs improvement] do you need? How many of this do you need? All right? But you don't want it to make it look like a grotesque hatchet job, where you said wonderful things, and then when the letter comes out, and then everything is terrible and negative. There's a little art to this, okay?
>
> The flattering stuff is written there so that one day a lawyer can say well, why would she say stuff that's nice about her? That just proves our credibility. That argument was crafted years ago. That's how it works.

Id at 20-22.

4. Regarding Linda Owens, vice principal of Wilson High School:

> Linda Owens, the vice principal, a beautifully dressed lady, at Wilson High School. She was contacted by Ms. Winthrop.
>
> This is another thing that one can sense a lawyerly hand on.
>
> After the decision's made, and my client is gone, and the paperwork is very well advanced, and we're into January of 2000, a couple of days before this letter to Ben Canada goes out saying don't worry, we got her –

> her – her – her – her – her file is papered; we're ready to get rid of her.
>
> Just a few days before that Winthrop calls Linda Owens and says, I want you to observe my APE teacher, just to get an independent opinion, just in case anybody should ever suggest I'm biased.
>
> Does that have a lawyer's hand in it? I would say, well, it looks that way.

Id at 31.

In sum, although never directly accusing them in words, Kafoury clearly accused defendants' trial counsel by gesturing towards them and arguing that:

1. "The lawyers" got involved in building a paper record to justify legal action;

2. "The lawyers" advised the District personnel to continue to mix positive comments with negative ones in observations and evaluations of plaintiff to mask deliberately retaliatory conduct; and

3. "The lawyers" gave scripts to defense witnesses about what to say to the jury, and in particular Chancler-Moore and Matarazzo.

There was nothing subtle about this tactic to persuade the jury to distrust defendants' trial counsel because they gave their witnesses scripts for dishonest testimony and participated in the alleged retaliatory conduct themselves. Despite Kafoury's rhetoric, there was no evidence that defendants' trial counsel were involved in any proceedings commenced by plaintiff until after this lawsuit was filed.

It is not improper to suggest that Winthrop may have given plaintiff positive comments in order to hide her retaliatory motive or that she received legal advice at one point that may have influenced her actions. However, it is improper to suggest that defendants' trial counsel gave such advice or even to suggest an imaginary thought process to explain how they master-minded this illegal retaliation against plaintiff. Counsel may argue legitimate and reasonable inferences, but inferences unsupported by the evidence are improper. *Walden v. Illinois Central Gulf R.R.*, 975 F2d 361, 365-66 (7th Cir 1992). A jury verdict cannot be based on mere speculation.

Plaintiff's counsel explains that saying witnesses were given a "script" was merely an innocuous reference to his understanding that they were prepared for trial. However, he succeeded in sending a far different message to the jury. Kafoury told the jury nothing less than that defendants' trial counsel had created a fictional script and directed their witnesses to act it out. Attempting to prejudice the jury by vilifying the adversary is improper. *Draper v. Airco, Inc.*, 580 F2d 91, 96-97 (3rd Cir 1978).

E. Arbitration Transcript

Plaintiff's counsel twice told the jury that the length of testimony in plaintiff's deposition and arbitration was 1,400 pages:

> I guess counsel wants to compare witnesses on their effectiveness and their accuracy and their steadfastness. I'm willing to do that.
>
> She mentioned Pamella Settlegoode, whose prior testimony consists of, if my addition is correct, some 1400 pages, 800 of which she hasn't seen

> except when she's on the stand and something is handed to her.
>
> * * *
>
> And – and – and that was worth something, I guess, out of-was it five and a half hours on the stand? 1400 pages? I think it was over two days.

Rebuttal Closing, pp. 33-34.

The trial court record reveals many instances where plaintiff refused to testify consistently at trial to identical questions asked of her in her deposition (Exhibits 655-57) and in her arbitration testimony (Exhibits 658-59). These impeachment exhibits were revealed during plaintiff's cross-examination, so Kafoury was aware of them by then, if not before.

On redirect examination (after it could not be corrected by defendants) to rehabilitate her cross-examination, Kafoury elided plaintiff's testimony that the transcript of her cross-examination in the arbitration was approximately 800 pages. As shown by Exhibits 658 and 659, plaintiff's arbitration testimony was a total of 272 pages, and of that, only 110 pages was cross-examination. Defendants' counsel explained to the court and plaintiff's counsel (outside the presence of the jury) at this stage of the trial the correct length of plaintiff's arbitration testimony.

But in the final argument, after defendants' counsel had reminded the jury that plaintiff failed to testify under oath consistently, Kafoury again misrepresented the total of plaintiff's cross-examination by defendant's counsel at the arbitration and deposition, saying it was 1,400 pages. This was false, and Kafoury either knew or should have

known it. The deposition and arbitration testimony of plaintiff was 876 pages.

To be sure, a jury could find the length of inquiry under oath to be an insufficient excuse for plaintiff's inability to testify consistently. On the other hand, Kafoury either recklessly or intentionally misled the jury on a critical issue, namely plaintiff's credibility. If he did not know the actual length, as he contends, then he had no justification for stating the length to the jury. Moreover, it is incomprehensible that plaintiff's lead trial lawyer would not have reviewed her deposition or the arbitration transcripts, especially after claiming in the trial during the cross-examination of plaintiff in her case-in-chief that he was not previously aware of the testimony.

F. Arbitration Award

Kafoury also mischaracterized the arbitration award:

> What it doesn't – what the arbitrator was not asked was: Was this done in retaliation for her free-speech activities, for her criticisms of the District, for her criticisms of administrators, for her pointing out that they were in violation of the law, for trying to protect the most helpless of their students, the weakest and neediest of her students.

Id at 36.

In fact, as Exhibit 501 plainly demonstrates, the arbitrator considered and rejected plaintiff's assertion that her evaluations were retaliatory. It is clearly improper to misstate evidence during closing argument. *Thomure v. Truck Ins. Exch.*, 781 F2d 141, 143 (8th Cir 1986).

G. Remedy

As noted above, a new trial is appropriate if an attorney's misconduct has so permeated an entire proceeding that the jury was influenced by passion and prejudice in reaching its verdict. *Anheuser-Busch*, 69 F3d at 348; *also see Blanche Road Corp. v. Bensalem Township*, 57 F3d 253, 264 (3rd Cir), *cert denied*, 516 US 915 (1995). Reversible error is committed when counsel's closing argument introduces extraneous matter that has a reasonable probability of influencing the verdict. *Edwards v. Sears, Roebuck & Co.*, 512 F2d 276, 285 (5th Cir 1975); *Rommel-McFerran Co. v. Local No. 369, Int'l Bhd. of Elec. Wkrs.*, 361 F2d 658, 661 (6th Cir 1966).

This court has no trouble concluding that the conduct by plaintiff's counsel was improper. This was not a case of a single, isolated, or inadvertent incident. Rather, Kafoury's improprieties occurred throughout the entire trial including closing argument. Courts usually permit counsel reasonable latitude in final arguments to the jury. After all, an ability to sway doubtful minds during jury argument is important not only to successful advocacy, but also to effective representation. But advocacy is circumscribed both by an attorney's own professional responsibility and the court's obligation to provide a fair trial. The only question is whether Kafoury's argument and other instances of misconduct exceeded proper bounds and was so conducive to prejudicing the jury's verdict that it substantially affected the total fairness of the trial.

Kafoury's conduct is even more significant in light of the factual question of causation and the excessive size of the verdict. The jury not only awarded plaintiff every penny of economic damages that she sought (based upon

her alleged inability to find a job paying more than about $20,000 a year for the next 13 years until her retirement), but also awarded every penny of non-economic damages that she sought with only the barest of evidence. This court is convinced that the amount of the verdict was due to passion and prejudice caused by the appeal of plaintiff's counsel to the jurors' sympathy for students with disabilities.

Although the basis for the jury's decision can never be known to a certainty, the verdict awarding plaintiff all the damages she sought indicates strongly that Kafoury's misconduct was a substantial influence. The cumulative effect of numerous and serious violations of the rules of proper argument as occurred here leads this court to conclude that it is more than reasonably probable that the verdict was influenced by his prejudicial statements. Kafoury's line of questions and comments emphasized irrelevant information having no bearing on the issues of the case and demonstrated a persistent effort to distract the jury from considering the evidence on the material issues before it. The cumulative effect of the misconduct was not harmless, sufficiently prejudiced the jury, and denied defendants a fair trial. Cautionary instructions could not have cured the unfair prejudice.

Defendants seek dismissal of the entire case or, in the alternative, a new trial. Dismissal of the case is an available remedy for attorney misconduct under some circumstances, such as repeated discovery violations under FRCP 41 and 37. *Gratton v. Great Am. Communications*, 178 F3d 1373, 1375 (11th Cir 1999) ("a court should be reluctant to impose the harsh sanction of dismissal with prejudice where the plaintiff is not actually culpable, but where any other sanction would fail to cure the harm that the attorney's

misconduct would cause to the defendant, dismissal may be appropriate"). However, defendants have cited no case affirming dismissal of a case based solely on misconduct of counsel during trial.

Granting judgment as a matter of law seems too harsh a remedy in this case. After all, plaintiff did submit evidence supporting her claim of retaliation. Had she heeded this court's warning when defendants orally moved for judgment as a matter of law at the close of her case-in-chief, she may have been able to cure the lack of evidence on causation. To dismiss this case based solely on the misconduct of her counsel would unduly punish plaintiff by denying her the opportunity to prove her case without unduly prejudicing the jury. Thus, this court concludes that had any of plaintiff's claims survived defendants' other motions for judgment as a matter of law, this court would grant a new trial to assure fairness and due process to defendants.

VII. Motion for New Trial on All Claims (Motion 8)

In the alternative to motions 1-7, defendants request a new trial on all claims. Although this court has granted defendants' motions for judgment as a matter of law on all claims, this court must also rule on the alternative motion for a new trial on all claims. FRCP 50(c)(1).

For the same reasons that this court has granted defendants' Motions 1-3 for judgment as a matter of law on all claims, defendants' motion for a new trial on all claims is conditionally granted. Adding the testimony of Winthrop and other interested witnesses to the mix of evidence for consideration by the court on a motion for a new trial supports even more strongly the error of the jury verdict.

Also, as discussed above, the misconduct of plaintiff's counsel during closing argument and throughout the trial already addressed under Motions 6 and 7 also justifies a new trial if this court erred in granting Motions 1-3. However, a new trial is conditionally denied in the alternative for Motions 4 and 5 for the same reasons that judgment as a matter of law is denied.

VIII. Motion for Mistrial or New Trial based on Jury Misconduct (Motion 9)

In the alternative to motions 1-8, because of jury's mistaken understanding of the jury instructions and award of damages using external information, defendants separately move this court for a mistrial and a new trial or, alternatively, further investigation of the entire jury by the court. Although this court has granted defendants' motions for judgment as a matter of law on all claims, this court must also rule on this alternative motion for a new trial. FRCP 50(c)(1).

On the Monday after the jury returned its verdict, one of the jurors telephoned the court to relay her concern that the jurors did not understand the instructions on damages. The juror reported that the jurors simply placed an upper limit on damages because some jurors were telling other jurors that the judge can adjust the damages down if they are excessive. Transcript of Proceeding, November 19, 2001 (docket # 174). In other words, the jury did not determine plaintiff's actual damages, but only the maximum amount of damages that the court could award. This misunderstanding apparently arose from the portion of the jury instructions that read: "Do not be concerned about potential multiple recovery for Dr. Settlegoode. If necessary,

I will make the appropriate adjustments when entering the final Judgment in this case."

The ability to question jurors about their decisions after they have been discharged is governed by FRE 606(b):

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

This rule strikes a balance between protecting the privacy of deliberation and mitigating against injustice. "The values promoted by the exclusion of the evidence include 'freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.' However, the [Advisory] Committee noted that 'putting verdicts beyond effective reach can only promote irregularity and injustice.'" *McCullough v. Consolidated Rail Corp.*, 937 F2d 1167, 1169 (6th Cir 1991), quoting FRE 606(b) Advisory Committee Notes.

Defendants argue that the policy concerns underlying FRE 606(b) are not implicated by the present case for several reasons. First, they contend that the juror did not report about the process of reflection in a way that threatens the sanctity of jury deliberation. The juror reported only that the jury had deliberated under the mistaken belief, derived externally as a result of information provided by members of the jury based on their understanding acquired before they were ever selected as jurors, that their damage award would be adjusted. Second, defendants assert that the facts do not indicate that any juror has been harassed into further service. In fact, the juror who called the judge had not been contacted by either party before calling. Finally, defendants note that a situation in which a jury did not understand the effect of its verdict is precisely one in which "putting verdicts beyond effective reach can only promote irregularity and injustice." FRE 606(b) Advisory Committee Notes.

The Ninth Circuit has yet to issue an opinion in a civil case about when and how the verdict of a jury can be questioned in light of a reported mistake. In a Ninth Circuit criminal case, however, the court upheld the lower court's decision to correct a jury verdict after the jury was discharged because the defendant's counsel discovered a clerical error on the verdict form. In *United States v. Stauffer,* 922 F2d 508 (9th Cir 1990), the jury had made an error in filling out the verdict form, causing them to convict on a charge for which they intended to acquit and to acquit on a charge for which they intended to convict. In upholding the lower court's post-trial decision to correct the jury's mistake, *Stauffer* reasoned that:

> The district court did not alter the jury's verdict itself, it simply corrected the verdict form to reflect the jury's true intent, Clearly, decreasing the impact of a judgment is less problematic to a defendant than expanding its impact. Still, this Court is convinced that no possible unfairness can be found in a judgment that reflects the jury's true intent.

Id at 514.

Here, in contrast, the jury did not make a clerical mistake. They simply misunderstood the jury instructions. Since this court has no idea what amount the jury would have awarded had it properly discharged their duty, it cannot give effect to the jury's actual intention.

Other courts have reached different conclusions when applying FRE 606. In *Robles v. Exxon Corp.*, 862 F2d 1201 (5th Cir), *cert denied*, 490 US 1051 (1989), the Fifth Circuit refused to change a reported jury verdict. The presiding juror told the judge immediately after the verdict was announced that there had been a misunderstanding and that the jury had not understood the instructions, which specified that by finding the plaintiff more than 50% negligent they had determined that the plaintiff would recover nothing. Instead, the jury thought that finding the plaintiff more than 50% negligent would result in the judge's determining damages. The Fifth Circuit reasoned that there had to be a clerical error before the court could set aside the verdict:

> The category of "clerical" errors . . . can be understood to refer only to discrepancies between the verdict delivered in court and the precise verdict physically or verbally agreed to in the jury room, not to discrepancies between the verdict delivered

> in court and the verdict or general result which the jury testifies it "intended" to reach.

Id at 1208 n9.

"[T]he only evidence that the jury misunderstood its instructions is deemed incompetent and inadmissible by Rule 606(b), and should not have been heard or considered by the district court." *Id* at 1208. *See also Karl v. Burlington N. R. Co.*, 880 F2d 68, 75 (8th Cir 1989) ("The admission of a juror's testimony is proper to indicate the possibility of a 'clerical error' in the verdict, but not the 'validity' of the verdict"); *Continental Cas. Co. v. Howard*, 775 F2d 876 (7th Cir 1985), *cert denied*, 475 US 1122 (1986).

Defendants urge this court to follow the reasoning of other circuits construing FRE 606. For example, in *Attridge v. Cencorp Div. of Dover Tech. Int'l, Inc.*, 836 F2d 113, 115-16 (2nd Cir 1987), rejected by *Robles,* the jury intended that the plaintiffs receive a net recovery of $150,000, an amount reached after subtracting the plaintiffs' negligence from a total award of $500,000. The jury reported $150,000 as their award, but the court deducted contributory negligence from that amount and awarded only $30,000. The Second Circuit held that the lower court had not erred when it interviewed jurors, and the initial verdict was not allowed to become the judgment.

Eastridge Dev. Co. v. Halpert Assocs., Inc., 853 F2d 772 (10th Cir 1988), affirmed the trial court's decision to correct the verdict when it was discovered that the jurors had reduced their verdict by the percentage of the plaintiff's negligence before reporting it to the court. The Tenth Circuit held that FRE 606(b) did not preclude the court from interrogating the jury concerning its verdict to

determine that the verdict did not accurately reflect the decision of the jury.

Also, *McCullough* upheld the lower court's decision to change a verdict when, once again, jurors made the post-trial discovery that they had mistakenly reduced their verdict by the percentage of contributory negligence. In both *Attridge* and *McCullough*, the courts discussed the specific post-verdict questions asked of the jury and determined that the questions did not intrude into the substance of deliberations. Rather, the questions "were intended to resolve doubts regarding the accuracy of the verdict announced, and not to question the process by which those verdicts were reached" *Attridge,* 836 F2d at 117. While protecting the sanctity of the jury room is important, "[t]his practice, of course, requires the verdict to reflect the true intent of the jury. Unyielding refusal to question jurors is without sound judgment where the court surmises that the verdict announced differs from the result intended." *Id* at 114.

Defendants assert that this court must grant a new trial because the amount that the jurors actually intended plaintiff to receive remains unknown. *See TeeVee Toons, Inc. v. MP3.com, Inc.,* 148 F Supp2d 276, 278-79 (SDNY 2001) (granting a new trial because all jurors reported that the damages figure they intended was far different from what was entered due to a mathematical error, but no one could remember the precise figure they had decided on). Based on the one juror's report to this court, the jury clearly made an error as to its role in determining damages. However, to ascertain the jury's true intent, this court would violate FRE 606 by asking about the process by which the jury reached its verdict. What amount a jury intended to award, as in *Attridge, Eastridge Dev. Co.,* and

McCullough, differs dramatically from why the jury arrived at their award. Such a forbidden inquiry can be avoided only if the jurors are asked "whether extraneous prejudicial information was improperly brought to the jury's attention." However, a juror's misunderstanding of jury instructions is simply not "extraneous prejudicial information." The misunderstanding did not come from outside the jury room, but apparently arose from information provided by some members of the jury to other members of the jury based on misinformation acquired prior to jury selection in this case.

This court agrees with defendants that without further inquiry, the amount that the jurors intended plaintiff to receive remains unknown and justice is thwarted. However, FRE 606 precludes this court from making any further inquiry. Thus, Motion 9 is conditionally denied.

IX. Motion for New Trial because Verdict as Contrary to the Evidence (Motion 10)

In the alternative to Motions 1-9, defendants request a new trial because the verdict is against the clear weight of the evidence. Although this court has granted defendants' motions for judgment as a matter of law on all claims, this court must also rule on the alternative motion for a new trial. FRCP 50(c)(1).

For the same reasons that this court has granted defendants' Motions 1-3 for judgment as a matter of law on all claims, defendants' motion for new trial on all claims is conditionally granted. Adding the testimony of Winthrop and other interested witnesses to the mix of evidence for consideration by the court on a motion for a new trial

supports even more strongly that the jury verdict was against the clear weight of the evidence. Also, as discussed above, the misconduct of plaintiff's counsel during closing argument and throughout the trial addressed under Motions 6 and 7 further justifies a new trial if this court erred in granting Motions 1-3.

However, a new trial is conditionally denied in the alternative for Motions 4, 5, and 9 for the same reasons that judgment as a matter of law is denied. Because it is redundant, Motion 10 is denied as moot with respect to Motion 8.

X. Motion to Limit Damages on Whistleblower Claim (Motion 11)

In the alternative to Motion 3 regarding the claim under Oregon's Whistleblower Act, defendants move the court for judgment limited to the amounts available under the Oregon Tort Claims Act, ORS 30.270. Although this court has granted Motion 3 for judgment as a matter of law on the claim for violation of Oregon's Whistleblower Act, this court must also rule on this alternative motion for a new trial. FRCP 50(c)(1).

This court previously addressed and rejected this same argument in *Draper v. Astoria School Dist. No. 1C,* 995 F Supp 1122, 1140 (D Or 1998), concluding that a "claim for violation of ORS 659.510 is exempt from the cap upon compensatory damages in ORS 30.270." *See also Rabkin v. Oregon Heath Science Univ.*, CV No. 01-943-PA (D Or November 27, 2001). For the same reasons, defendants' motion to limit damages on the Oregon Whistleblower Act claim in this case lacks merit. Thus, Motion 11 is conditionally denied.

DATED this 31st day of January, 2002.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DR. PAMELLA E. SETTLEGOODE, Plaintiff, v. PORTLAND PUBLIC SCHOOLS, Multnomah School District No. 1; SUSAN WINTHROP; ROBERT CREBO; and LARRY WHITSON, Defendants.	)	CV-00-313-ST ORDER

STEWART, Magistrate Judge:

For the reasons set forth in the accompanying Opinion, defendants' Motions for Judgment as a Matter of Law, Mistrial, and New Trial (docket #156) are GRANTED in part and DENIED in part as follow:

Motion 1 for judgment as a matter of law on Claim One: Granted;

Motion 2 for judgment as a matter of law on Claim Two: Granted;

Motion 3 for judgment as a matter of law on Claim Four: Granted;

Motion 4 for judgment as a matter of law as to punitive damages: Denied as moot;

Motion 5 for judgment as a matter of law as to economic damages on all claims: Denied as moot;

Motion 6 for judgment as a matter of law on all claims based on improper conduct of plaintiff's attorney in his closing rebuttal: Denied as moot;

Motion 7 for judgment as a matter of law on all claims based on misconduct of plaintiff's attorney throughout the trial: Denied as moot;

Motion 8, in the alternative to Motions 1-7, for a new trial on all claims: Conditionally granted as to Motions 1-3, 6 and 7 and conditionally denied as to Motions 4 and 5;

Motion 9, in the alternative to Motions 1-8, for a mistrial and a new trial, or, alternatively, further investigation of the entire jury by the court based on the jury's mistaken understanding of the jury instructions: Conditionally denied;

Motion 10, in the alternative to Motions 1-9, for a new trial on all claims because the verdict is against the clear weight of the evidence: Conditionally granted as to Motions 1-3, 6 and 7; conditionally denied as to Motions 4, 5 and 9; denied as moot as to Motion 8; and

Motion 11 to limit the damages recoverable on Claim Four to the amount available under the Oregon Tort Claims Act: Conditionally denied.

DATED this 31st day of January, 2002.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DR. PAMELLA E. SETTLEGOODE, Plaintiff, v. PORTLAND PUBLIC SCHOOLS, Multnomah School District No. 1; SUSAN WINTHROP; ROBERT CREBO; and LARRY WHITSON, Defendants.	)	CV-00-313-ST JUDGMENT (Filed Jan. 31, 2002)

STEWART, Magistrate Judge:

Based on the record herein, this court directs entry of Judgment in favor of defendants on all claims and this action is dismissed.

DATED this 31st day of January, 2002.

/s/ Janice M. Stewart
Janice M. Stewart
United States
Magistrate Judge

Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

No. 04-313

In The Supreme Court of the United States

PORTLAND PUBLIC SCHOOLS,
SUSAN WINTHROP, and ROBERT CREBO,

Petitioners,

v.

PAMELLA E. SETTLEGOODE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Portland Public Schools and two of its administrators, Susan Winthrop and Robert Crebo (collectively, the Portland Schools) seek certiorari on the grounds that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power". Petition at 5. In every stage of this proceeding the Portland Schools have alleged misconduct or irregularity. After the jury rendered its verdict in this case the Portland Schools alleged that trial attorney Kafoury had committed misconduct during trial, even though Portland Schools failed to object to the alleged misconduct during trial. *Settlegoode v. Portland Public Schools*, 371 F.3d at 503, 517 (9th Cir. 2004). Portland Schools also alleged juror misconduct based upon a juror's statement to the press that the jury intended to send a message to the school district with its verdict. The trial court properly denied Portland Schools' Motion 9. Appendix at 143. Neither of the misconduct allegations were well founded in law or fact. Similarly, the claim that the Ninth Circuit has so far departed from its usual course is unfounded.

The Portland Schools' petition is based on the assertion that the panel only used a single footnoted sentence to dispose of the Portland Schools' claim that Dr. Settlegoode failed to challenge the District Court's Order granting a new trial. Petition at 5 ("in a single footnoted sentence . . . "). However, after the mandate was issued, Portland Schools filed a motion to recall the mandate. The Order denying the motion to recall the mandate expressly addressed Portland Schools concern that the panel had not considered Portland Schools' contentions, to wit:

> They merely resurrect the argument that Plaintiff waived her challenge to the District Court's

> grant of a new trial. Defendants raised this argument before the panel, and we rejected it. None of our colleagues called for a vote on the petition for rehearing en banc. Order, Resp. App. at 2.

The Ninth Circuit found that in granting the Portland Schools' motion for new trial the Magistrate Judge applied the wrong burden of proof standard – even though the jury had been properly instructed on the burden of proof. The crucial issue in the case was whether Portland Schools would have fired Dr. Settlegoode if she had not repeatedly complained about the way disabled students were treated in Portland Schools. The jury specifically found that the defendants did not prove by a preponderance of the evidence that they would not have renewed Dr. Settlegoode's contract for reasons other than Dr. Settlegoode's protected speech. *Settlegoode*, 371 F.3d at 512. The Appellate Opinion quotes a paragraph of the Magistrate Judge's opinion in which the Magistrate Judge shifted the burden of proof onto Settlegoode. Further, the Court of Appeals found that the jury's verdict was "amply supported by the record, regardless of where the burden of proof falls". *Settlegoode*, 371 F.3d at 512, n.6.

Finally, the Court of Appeals noted that the Magistrate Judge should have only overturned the jury's verdict if it was "seriously erroneous". The Court of Appeals could not "see how the jury's finding could possibly be deemed seriously erroneous".[1] The Magistrate Judge, "started off on the wrong foot by failing to acknowledge the jury's determination of the issue",[2] applied the wrong burden of

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[1] *Settlegoode*, 371 F.3d at 514.

[2] *Settlegoode*, 371 F.3d at 513.

proof,[3] and overturned a verdict amply supported by the record.[4] The Ninth Circuit properly reinstated the jury's verdict. Even assuming for the purpose of argument that Settlegoode did not appeal the grant of a new trial based on the insufficiency of evidence, the Magistrate Judge committed plain error which the Ninth Circuit corrected.

Portland Schools does not complain of any evidence that was improperly submitted to the jury, nor does it complain that the jury was improperly instructed as to the law. The Court of Appeals expressly found that there was ample evidence to support the jury's verdict. Under these circumstances, a new trial would be an injustice.

The Ninth Circuit expressly rejected the issue raised by Portland Public Schools on two separate occasions. Whether the Ninth Circuit concluded that plaintiff's brief, when read as a whole, adequately raised the issue, or instead corrected the Magistrate Judge's ruling on a plain error basis is unknown. What is for sure is that the Magistrate Judge committed plain error. There is no split in the circuits over whether an Appellate Court can remedy plain error.

Portland Schools asserts that "the law of all the circuits – including the Ninth Circuit – precludes the Court from addressing issues not raised in an opening brief." Petition at 9. This is simply wrong. *Koerner v. Gvigas,* 328 F.3d 1039 (9th Cir 2003); *United States v. Vllah*, 976 F.2d 509 (9th Cir 1992). The Supreme Court has also reserved the authority to address a matter that has not been assigned as error. *Silber v. United States*, 82 S. Ct.

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[3] *Settlegoode*, 371 F.3d at 511, 512.

[4] *Settlegoode*, 371 F.3d at 512 n.6.

1287 (1902). See also, *Rules of the Supreme Court of the United States*, Rule 24(a) ("At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide".)

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAMELA E. SETTLEGOODE, Plaintiff-Appellant, v. **PORTLAND PUBLIC SCHOOLS, Multnomah School District No.1; SUSAN WINTHROP; ROBERT CREBO; LARRY WHITSON,** Defendants-Appellees.	No. 02-35260 D.C. No. CV-00-00313-ST **ORDER** (Filed July 26, 2004)

Before: **D.W. NELSON, KOZINSKI** and **McKEOWN**, Circuit Judges.

Defendants seek recall of the mandate pending the filing of a writ of certiorari in the United States Supreme Court.

The Supreme Court discussed the standard for determining whether recall of a mandate is justified in *Calderon* v. *Thompson*, 523 U.S. 538 (1998), a case defendants do not cite. As *Thompson* explains, the power to recall the mandate is a power "of last resort," one that is to be used "only in extraordinary circumstances" and "held in reserve against grave, unforeseen contingencies." *See id.* at 550.

Apparently unaware of the applicable legal standard, defendants come nowhere near satisfying it. They merely resurrect the argument that plaintiff waived her challenge to the district court's grant of a new trial. Defendants raised this argument before the panel, we rejected it. None of our colleagues called for a vote on the petition for rehearing en banc. *See* Fed. R. App. P. 35.

Issuing the mandate will not frustrate defendants' ability to petition for certiorari. Even if the judgment were satisfied before the Supreme Court could rule on a certiorari petition, that would not render the petition moot. It would simply require that, were defendants to prevail, plaintiff repay the judgment. If defendants have legitimate concerns that plaintiff will dissipate or hide the money prior to final resolution of the case by the Supreme Court, they may petition the district court for an order requiring plaintiff to post security or for alternative safeguards.

Whatever equities weigh in defendants' favor fall short of the "extraordinary circumstances" required by *Thompson*. *See* 523 U.S. at 550. Further, these equities are offset by the harm plaintiff would suffer by being deprived for several additional months of a judgment she won over two years ago.

The motion to recall the mandate is DENIED.

Supreme Court, U.S.
FILED
OCT 15 2004
OFFICE OF THE CLERK

(3)

No. 04-313

In The Supreme Court of the United States

PORTLAND PUBLIC SCHOOLS,
SUSAN WINTHROP, and ROBERT CREBO,

Petitioners,

v.

PAMELLA E. SETTLEGOODE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In response to the petition for certiorari, Pamella Settlegoode does not contest the fact that she failed to challenge the district court's order granting a new trial. Nor does she address the impact of *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), on her failure to challenge the new trial order. Instead, Settlegoode speculates that the Ninth Circuit must have concluded that (1) her brief, when read as a whole, adequately challenged the new trial ruling, or (2) the district court committed plain error in awarding a new trial. Neither of these suppositions is true.

The Ninth Circuit did not determine that Settlegoode adequately challenged the district court's order granting a new trial. Indeed, neither Settlegoode's brief nor the Ninth Circuit's original opinion even mentioned, let alone analyzed, the order granting a new trial. Only after Portland Public Schools filed its petition for rehearing did the Ninth Circuit address the order granting a new trial, and the court's amended opinion did not find – and could not reasonably have found – that Settlegoode challenged the new trial order on appeal.

Likewise, the Ninth Circuit did not purport to apply the plain error doctrine to the district court's order granting a new trial. The court's original and amended opinions make no mention of the term "plain error," nor do they discuss any exception to the uniform rule that appellate courts review only those rulings challenged on appeal.

Moreover, had the Ninth Circuit applied the plain error doctrine to the order granting a new trial, it would have been inappropriate to do so. This Court has described the plain error doctrine as follows: "'In exceptional circumstances,

especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Silber v. United States*, 370 U.S. 717, 718 (1962) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). Given the wide latitude afforded to district courts in deciding a motion for a new trial – including the ability to assess witness credibility and to weigh the evidence – the Ninth Circuit could not properly have concluded that the grant of a new trial was plain error. If the plain error doctrine allowed the Ninth Circuit to reverse the unchallenged order granting a new trial, the doctrine would swallow the settled rule that appellate review is confined only to those rulings challenged on appeal.

The Court's decision in *El Paso*, as well as the law of every circuit, prohibits appellate courts from reviewing rulings not challenged on appeal. Because Settlegoode did not challenge the district court's order granting a new trial on appeal, the Ninth Circuit erred when it addressed and reversed that order. Accordingly, the Court should vacate the Ninth Circuit's amended opinion and remand the case to the district court for a new trial on all claims.

Respectfully submitted,

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